TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 156.

ROCHESTER RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF ROCHESTER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 4, 1905.

(20,003.)

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a Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 6th day of June in the year of our Lord one thousand nine hundred and five, before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, presiding.

W. H. SHANKLAND, *Clerk.*

Amended Remittitur Oct. 18th, 1905.

THE CITY OF ROCHESTER, Appellant,
ag'st
ROCHESTER RAILWAY COMPANY, Respondent.

Be it remembered, that on the 22nd day of December in the year of our Lord one thousand nine hundred and four, The City of Rochester, the appellant in this action, came here into the Court of Appeals, by W. W. Webb, Corporation Counsel, its attorney, and filed in the said Court a notice of appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Rochester Railway Company, the respondent in said action, afterwards appeared in said Court of Appeals by Satterlee, Bissell, Taylor & French, its attorneys.

b Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. William W. Webb, Corporation Counsel, of counsel for the appellant, and by Mr. Charles J. Bissell, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Supreme Court appealed from in this action be reversed, annulled, and altogether held for nothing. And it was further ordered and adjudged that the Supreme Court award final judgment for the amount claimed in the complaint and for interest and costs.

And it was also further ordered that the record aforesaid and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed, annulled and altogether held for nothing, and that the Supreme Court award final judgment for the amount claimed in the complaint and for interest and costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and

provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

c COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Oct.* 18*th*, 1905.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal of the Court of Appeals of the State of New York.]

W. H. SHANKLAND, *Clerk.*

d STATE OF NEW YORK:

In the Court of Appeals.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

Record on Appeal.

W. W. Webb, Corporation Counsel, Attorney for Appellant, Rochester, N. Y.
Satterlee, Bissell, Taylor & French, Attorneys for Respondent, Rochester, N. Y.

1 Supreme Court, Appellate Division, Fourth Department.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

Statement.

This action was commenced by the service of a summons and complaint on the defendant, on the 15th day of December, 1902. The answer was served December 24, 1902. There has been no change of parties. By an order of the Supreme Court granted January 14, 1904, W. W. Webb was substituted in place and stead of William A. Sutherland as attorney for the plaintiff.

Supreme Court, County of Monroe.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

To the Above Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney
2 within twenty days after the service of this Summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Monroe.

Dated this 13th day of December, 1902.

WM. A. SUTHERLAND,
Corporation Counsel, Plaintiff's Attorney.

Office and P. O. Address, 48 City Hall, Rochester, N. Y.

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

The City of Rochester, the plaintiff in the above entitled action, complains of the defendant, Rochester Railway Company, and alleges, that at all the times hereinafter mentioned, this plaintiff was and still is a municipal corporation organized and chartered and incorporated under and by virtue of and pursuant to the laws of the State of New York.

That during the times hereinafter mentioned, the defendant was, and still is, a street surface railroad corporation, organized,
3 chartered and incorporated under and by virtue of and pursuant to the laws of the State of New York, and having its principal place of business in said City of Rochester.

That the defendant, before any of the dates hereinafter mentioned, had constructed and operated, and during all the times hereinafter mentioned it continued to operate, a street surface railroad for public use in the conveyance of persons and property for compensation upon and along a number of the streets, avenues, roads and highways of the said City of Rochester, and among others, upon and along Park avenue and St. Paul street in said city; and that at all of the said dates and times the defendant had used and was continuing to use, and still uses, said street railway tracks in the said Park avenue and St. Paul street in the said City of Rochester.

That the Railroad Law of the State of New York, being Chapter 565 of the Laws of 1890, at § 98 in Article 4 thereof provides as follows:

"Every street surface railroad corporation, so long as it shall con-
" tinue to use any of its tracks in any street, avenue or public place
" in any city or village, shall have and keep in permanent repair that
" portion of such street, avenue or public place, between its tracks,
" the rails of its tracks and two feet in width outside of its tracks,
" under the supervision of the proper local authorities, and when-
" ever required by them so to do, and in such manner as they may
" prescribe. In case of the neglect of any corporation to make pave-
" ments or repairs after the expiration of thirty days' notice to do so,
" the local authorities may make the same at the expense of such cor-
" poration, and such authorities may make such reasonable regula-
" tions and ordinances as to the rate of speed, mode of use of tracks,
" and removal of ice and snow, as the interests or convenience of
" the public may require."

4 That afterwards, and in the year 1894, the said defendant made application in writing to the proper authorities of the City of Rochester, for a ratification and confirmation of the location of its tracks as operated and used through and along the various streets, avenues and highways in said application named, among others being the street known and hereinafter referred to as Park avenue, and the street known and hereinafter referred to as St. Paul street; and thereupon and after due consideration and after hearing all persons appearing before the Common Council pursuant to notice therefor, relative to said ratification and confirmation, the Common Council of the City of Rochester duly adopted resolutions with reference thereto, among which was the following:

"Resolved, That the location of the tracks of said Rochester Rail-
" way Company as now operated and used by said company in the
" streets, avenues and highways hereinafter named and as herein-
" after specifically described, is hereby ratified and approved, subject
" to such changes and alterations as the Common Council may from
" time to time direct, and subject to all the rights and privileges now
" possessed by the city under existing contracts or agreements or
" by law, nevertheless, upon the following conditions:

"First—That the provisions of Article 4 of the Railway Law of the
" State of New York, being an act in relation to railroads, constitut-
" ing Chapter 39 of the General Laws of the State of New York, be
" complied with;" and that thereupon the defendant and the plaintiff entered into a written agreement, under date of March 31, 1894, duly executed by and on the part of the defendant by its proper officers theretofore duly authorized for that purpose, whereby the defendant, Rochester Railway Company, did agree to and with the City of Rochester, this plaintiff, to accept, and in each and every thing and particular well and truly comply with each and all

5 of the provisions and conditions contained and made in the therein included and accompanying resolutions, being the resolutions hereinbefore recited. That in and by the terms of the said resolution and of the said written contract, the tracks of the defendant were described as then existing upon all parts of the said Park avenue and the said St. Paul street, which are hereinafter referred to as having been subsequently improved and repaved.

That afterwards, and in the year 1899, the defendant, Rochester Railway Company, requested of the proper local authorities of the City of Rochester, consent to construct, maintain and operate an extension of its street railroad upon the surface of, through and upon a certain street and avenue in said city of Rochester, being the street and avenue named in said written application. That thereafter and on or about August 15, 1899, the said consent of the proper city authorities was duly granted, upon condition, however, in said consent contained in these words: "That the consent "hereby granted is granted upon the express condition that the pro- "visions of Article 4 of an act in relation to railroads, constituting "Chapter 39 of the General Laws of the State of New York, and the "acts amendatory thereof, be complied with." That thereupon the defendant, Rochester Railway Company, accepted said consent, subject to said express condition above quoted.

That thereafter, divers questions having arisen between the plaintiff and the defendant, as to the rights and liabilities of the parties under said Article 4 of the said Railroad Law, a contract was duly entered into between the parties hereto, in the year 1901, which provided among others at its third clause as follows: "That as to claims "which may hereafter be made by the city against the Railway "Company for all pavements hereafter made in the streets or parts
"of streets within said city, in which the Rochester City and
6 "Brighton Railroad Company obtained its franchise or con-
"structed a railroad prior to the 7th day of May, 1884, the "question of the liability of the railroad company to pay for making "pavements in such streets or parts of streets, between its tracks, the "rails of its tracks and two feet outside, or any part thereof, shall "be litigated and determined in a court having jurisdiction; such "questions to be raised as speedily as possible, in such manner as "may be agreed upon by the Corporation Counsel of the city and "the counsel of the railway company, and such questions to be "finally judicially determined in the courts."

II.

The plaintiff further complaining of the defendant, alleges that on or about the 17th day of July, in the year 1900, it became and was necessary to repair, repave or construct a new pavement and adjustment of the same to grade, in Park avenue, in the City of Rochester aforesaid, and the proper authorities of the said city did, after due notice given pursuant to the statutes and ordinances and contracts thereunto relating, proceed with the said repaving and new pavement and adjust the same to grade in said Park avenue in said city, and this defendant neglected for the said thirty days and refused after due notice to make said pavement or repavement, and this plaintiff necessarily incurred an expense of thirty-eight hundred dollars ($3,800) in so repaving the said street between the tracks of the defendant, the rails of its said tracks and two feet in width outside of its tracks, which expense was incurred and paid on the 2d day of December, in the year 1901; and that this plaintiff necessarily in-

curred an expense of five hundred fifty-six dollars and twenty-four cent- ($556.24) in so repaving said street between the tracks of the defendant, the rails of its said tracks and two feet in width outside of its tracks, which expense was incurred and paid on the
7 18th day of January, 1902. That though often requested so to do, the said defendant has not paid the plaintiff the said sum of $4,356.24 or any part thereof.

Second.

For a second and further cause of action, the plaintiff repeats and reaffirms all of the allegations in the first cause of action down to the second subdivision thereof, at folio 14, and makes the same a part of this cause of action.

II. Further complaining of the defendant, the plaintiff alleges that on or about the 24th day of April, 1900, it became and was necessary to repair, repave, or construct a new pavement and adjust the same to grade in St. Paul street in the City of Rochester aforesaid, and the proper authorities of said city did, after due notice given pursuant to the statutes and ordinances and contracts thereunto relating, proceed with the said repaving and new pavement and adjustment of the same to grade, and did repave and construct a new pavement and adjust the same to grade in said St. Paul street, in said city, and this defendant neglected for the said thirty days, and refused after due notice, to make said pavement or repavement, and this plaintiff necessarily incurred an expense of four thousand two hundred dollars ($4,200) in so repaving said street between the tracks of the defendant, the rails of its tracks and two feet in width outside of its tracks, which expense was incurred and paid on the 30th day of September in the year 1901; that this plaintiff also necessarily incurred an expense of five thousand two hundred and fifty dollars in so repaving said street between the tracks of the defendant, the rails of its said tracks and two feet in width outside of its tracks, which expense was incurred and paid on the 23d day of November, in the year 1901; and that this plaintiff also necessarily incurred an expense of four thousand four hundred and fifty-seven dollars
8 and seventy-eight cents ($4,457.78) in so repaving said street between the tracks of the defendant, the rails of its said tracks and two feet in width outside of its tracks, which expense was incurred and paid on the 21st day of February, in the year 1902. That though often requested so to do, the defendant has not paid the plaintiff the said sum of $13,907.78, or any part thereof.

Wherefore, plaintiff demands judgment against the defendant for $18,274.02, with interest on $4,200 thereof from September 30, 1901; on $5,250 thereof from November 23, 1901; on $3,800 thereof from December 2, 1901; on $556.24 thereof from January 18, 1902; and on $4,457.78 thereof from February 21, 1902, together with the costs of this action.

WILLIAM A. SUTHERLAND,
Corporation Counsel, Attorney for Plaintiff,
46 *City Hall, Rochester, N. Y.*

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

A. J. Rodenbeck, being duly sworn, deposes and says that he is the Mayor of the City of Rochester, the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. J. RODENBECK.

Sworn to before me this 13th day of December, 1902.

F. X. PIFER,
Com. of Deeds.

9 Supreme Court, Monroe County.

THE CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

The above named defendant, for an answer to the complaint of the plaintiff herein, and for an answer to each of the several causes of action therein stated and set forth, admits that the Railroad Law of the State of New York contains the provision as set forth in the complaint.

It admits that in the year 1894 defendant made application in writing to the proper authorities of the City of Rochester for a ratification and confirmation of the location of its tracks, as operated and used through and along the various streets, avenues and highways in said application named, among others being the street known as Park avenue, and the street known as St. Paul street, and in this connection the defendant alleges that such application in writing was presented to the Common Council of the City of Rochester on the 11th day of December, 1894, and the streets named in such written application constituted all the streets, avenues and highways in the City of -ester in which the defendant had constructed and was then operating a street railway, and the defendant craves leave to refer to said petition and to the whole thereof, with the same force and effect as if the same were herein set forth at large.

And the defendant admits that after the presentation of said petition, and after due consideration, and after hearing all persons appearing, the Common Council adopted resolutions with reference thereto; that among such resolutions was the provision set
10 forth in the complaint herein. And this defendant in this behalf alleges that such resolutions were passed by the Common Council of the plaintiff on the 31st day of December, 1894, and contained other provisions than those set forth in the complaint, and this defendant craves leave to refer to said resolutions with the same force and effect as if the same were herein set forth at large. And the defendant admits that thereupon, and pursuant to said resolutions, the defendant and the plaintiff entered into a written agreement,

bearing date December 31, 1894, duly executed by and on the part of the defendant, by its proper officers theretofore duly authorized for that purpose, and that in and by said agreement the defendant agreed with the plaintiff to accept, and in each and every thing and particular well and truly comply with each and all the provisions and conditions contained and made in the therein included and accompanying resolutions, being the resolutions of December 31, 1894; and that in and by the terms of the said resolutions, and of the said written contract, the tracks of this defendant were described as then existing upon all the parts of Park avenue and St. Paul street which are referred to in the complaint, as having been subsequently improved and re-paved, but the defendant in this behalf alleges that the said contract contained many other provisions than such as are quoted and referred to in the complaint, and this defendant craves leave to refer to said contract with the same force and effect as if the same were herein set forth fully and at large.

The defendant further admits that in the year 1899 it requested from the proper local authorities of the City of Rochester consent to construct, maintain and operate an extension of its street railroad upon the surface of, through and upon a certain street and avenue in the City of Rochester, being the street and avenue named in its written application; that thereafter and on or about August 15, 1899, the said consent of the proper city authorities was duly
11 granted, upon the condition which is partially quoted in the complaint, and in this behalf the defendant alleges that such condition is not quoted in full in the complaint, and it hereby craves leave to refer to the ordinance and resolution of the Common Council dated the 15th of August, 1899, with the same force and effect as if the same were herein set forth at large.

And this defendant denies that after the passage of such resolution, this defendant accepted said consent, subject to the condition referred to, or to any condition contained in such resolution, and denies that it in any manner constructed its road, or in any wise acted upon said resolution.

It admits that in the year 1901 divers questions had arisen between the plaintiff and defendant as to the rights and liabilities of the parties under Article 4 of the Railroad Law, and also, as the defendant alleges, under other statutes of the State of New York, and admits that the contract was duly entered into between the parties hereto in the year 1901, and contained among other provisions the provision set forth in the complaint herein, but in this behalf the defendant alleges that such contract contained many other provisions between the parties, and the defendant craves leave to refer to said contract and the whole thereof with the same force and effect as if the same were herein set forth fully and at large.

And this defendant further alleges in this behalf that such contract was duly confirmed by the Legislature of the State of New York by the provisions of Chap. 562 of the Laws of 1901.

And this defendant further answering the complaint herein and the several causes of action therein set forth, denies that it has any knowledge or information sufficient to form a belief as to whether on

or about the several days set forth in the complaint, or at any
12 other time, it became or was necessary to repair, repave or construct new pavement or adjust the same to grade in Park avenue or in St. Paul street in the City of Rochester.

It admits that on or about the times alleged in the complaint, the plaintiff did proceed with re-paving and making a new pavement, and adjusting the same to grade, and did re-pave and construct a new pavement and adjust the same to grade in Park avenue and in St. Paul street in said city; but this defendant denies upon information and belief that either of said new pavements or adjustments to grade were made after due notice given pursuant to the statutes, ordinances or contracts thereunto relating, and this defendant denies that it neglected for thirty days, or refused after due or proper or legal notice, to make said re-pavements in either of said streets.

And this defendant denies that it has any knowledge or information sufficient to form a belief as to whether the plaintiff necessarily incurred an expense amounting to the several sums set forth in the complaint in re-paving Park avenue between the tracks of the defendant, the rails of its said tracks, and two feet in width outside of said tracks. And the defendant denies that it has any knowledge or information sufficient to form a belief as to whether the plaintiff necessarily incurred the expenses in re-paving St. Paul street between the tracks of defendant, the rails of its tracks, and two feet in width outside of its tracks, referred to and set forth in the complaint.

And it denies that it has any knowledge or information sufficient to form a belief as to whether the plaintiff paid the several sums set forth and alleged in the complaint in both of the causes of action at the times mentioned in said complaint, or at any time.

And this defendant denies that it has any knowledge or information sufficient to form a belief as to what was the reasonable
13 cost and worth of the pavements and adjustments to grade alleged to have been made in the several causes of action stated in the complaint, or what was the reasonable worth or expense incurred of either of them.

II.

And for a second, separate and further defense to each of the causes of action set forth in the complaint, this defendant upon information and belief alleges:

First—That the defendant is a domestic street surface railroad corporation, duly incorporated under an act of the Legislature of the State of New York, entitled "An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof, in cities, towns and villages," passed May 6, 1884, said Act being known as Chap. 252 of the Laws of the State of New York of that year. And the defendant further alleges that under and pursuant to the provision of said Act, it filed its Articles of Association in the office of the Secretary of State of the State of New York on the 25th day of February, 1890, and that the route designated in its Articles of Association comprises, with other routes, the route designated in the Articles of Association of the Rochester City & Brighton Railroad Company hereinafter mentioned, and included

both of the streets mentioned and referred to in the complaint herein.

Second—That at the dates and times for that purpose hereinafter mentioned, the Rochester City & Brighton Railroad Company was a domestic railroad corporation duly incorporated on or about May 31st, 1862, under and pursuant to the provisions of an act of the Legislature of the State of New York, entitled "An Act to authorize the formation of railroad corporations and to regulate the same," passed April 2nd, 1850, and the several acts amendatory thereof, said Act of 1850 being known and designated as Chapter 140 of
14 the Laws of the State of New York of that year.

Third—This defendant further alleges, upon information and belief, that on the 24th day of June, 1862, pursuant to the provisions of the said Act of 1850 in such case made and provided, the Common Council of the City of Rochester granted, by resolution and ordinance, to the said Rochester City & Brighton Railroad Company, its assent to the construction, maintenance and operation of its railroad in and through the streets and avenues in the City of Rochester designated in its Articles of Association.

This defendant further alleges that in and by said resolution and ordinance it was, among other things, provided as follows:

"Resolved, That the Common Council of the City of Rochester "will permit to be constructed in said city by the Rochester City & "Brighton Railroad Company, a corporation organized under and "by the authority of the general railroad law, passed April 2, 1850, "and the several acts amending the same, a railroad which shall "commence in the Town of Brighton, Monroe County, to run along "the Brighton road to East avenue in said city; along East avenue, "Main and Buffalo streets and West avenue to the Town of Gates; "also from East avenue along and through Prince street to University "avenue, and through University avenue to Main street; also, from "University avenue along Main street to East avenue; also, from the "Town of Brighton through Mt. Hope avenue to and through Clarissa to Greig street; also, through Greig street to and through "Plymouth avenue to Buffalo street; also, from Clarissa street to and "through Exchange street to Buffalo street; also, from Buffalo street "through State street and Lake avenue, so-called, into the Town of "Greece; also, from the junction of Clarissa street and Mt. Hope "avenue through said avenue and through South and North St.
"Paul streets to the Town of Irondequoit; also from Main
15 "street through Clinton street to Monroe avenue, and through
"Monroe avenue to and through Alexander street to East "avenue; also, from Main street through North Clinton street to the "Town of Irondequoit. To be constructed, established, maintained "and operated upon the terms, conditions and stipulations herein-"after prescribed."

"SECTION 2. The track of said railroad shall be so laid as to per-"mit the free passage of vehicles and carriages over the same, and "the rails shall be laid even with the surface of the streets, and shall "conform to the grades thereof as now established, or as they shall "from time to time be established or altered. Said company shall, "under the direction of, and as required by, the Common Council

"of the City of Rochester, improve, with such suitable material as "said Common Council shall direct, and in a proper manner between "the rails and for two feet and four inches outside thereof, and shall "keep the surface of the street inside the rails and for two feet and "four inches outside thereof in good repair, and all dirt and filth "removed therefrom as may be directed and required by the said "Common Council."

Fourth—This defendant further alleges upon information and belief that on or about the 16th day of October, 1862, the said Rochester City & Brighton Railroad Company duly executed and delivered to Hobart F. Atkinson, as trustee, a mortgage of all its property, rights, privileges and franchises to secure an issue of bonds of the face value of one hundred thousand dollars, which mortgage was duly recorded in the office of the Clerk of the County of Monroe in the State of New York, in Liber 108 of Mortgages, at page 217, and that thereafter default having occurred in the fulfillment of the conditions of said mortgage on the part of said mortgagor, an action was duly commenced by said Hobart F. Atkinson, as trustee, in the Supreme Court of the State of New York, for the foreclosure of
16 said mortgage, and that such proceedings were thereafter duly had in such action as that a decree of foreclosure of said mortgage and for the sale of the mortgaged property, franchises and rights and privileges of the said Rochester City & Brighton Railroad Company was duly made and entered in said Supreme Court, and on or about the 28th day of February, 1868, under and pursuant to said decree, said property, rights, privileges, franchises and interests of said Rochester City & Brighton Railroad Company were duly sold and the same were duly purchased by Chauncey B. Woodworth, to whom the same was duly conveyed by the officer making such sale, which conveyance is duly recorded in the office of the Clerk of the County of Monroe, and thereupon the said Chauncey B. Woodworth became and was the owner of all the property, rights, privileges, franchises and interests of the said Rochester City & Brighton Railroad Company.

This defendant further alleges, upon information and belief, that on or about March 5, 1868, the said Chauncey B. Woodworth, purchaser at said foreclosure sale, pursuant to the statutes of the State of New York in such case made and provided, duly associated with himself as such purchaser at such foreclosure sale certain individuals, and duly filed in the office of the Secretary of State articles of association, reciting, among other things, as follows:

"Now, therefore, the persons whose names are subscribed hereto "hereby associate themselves together and form a company by the "name of the Rochester City & Brighton Railroad Company for "the purpose of making and operating the railroad in the City of "Rochester heretofore constructed, maintained and operated by the "said Rochester City & Brighton Railroad Company, a corporation "organized as aforesaid on the 31st day of May, 1862, in and
"through the streets wherein the said railroad is now laid
17 "and run and in and through such other streets as the public "interests may hereafter require, with such other tracks, side

" tracks, switches, and turnouts as such public interests may from " time to time demand.

" The said Company is to continue ninety-nine years."

Fifth—This defendant further alleges, upon information and belief, that immediately after the incorporation of the Rochester City & Brighton Railroad Company by the said purchaser at said foreclosure sale and his associates, the said railroad company duly petitioned the Common Council, protesting against the onerous conditions of Section 2 of the said resolution of 1862 granting the assent of the Common Council, and setting forth the inability of the new corporation to proceed with the operation of the railroad subject to such conditions, and the fact that the road had never paid owing to the existence of such conditions, and thereupon the Common Council of the City of Rochester on the 12th day of January, 1869, duly amended the last clause of said Section 2 of that ordinance so as to read as follows:

"Said company shall, as soon after the adoption of this ordinance " as the condition of the streets through which their tracks *is* laid will " permit, put the surface of the streets inside the rails and for one " foot outside the rails thereon in good and thorough repair, under " the direction of the Committee on Streets and Bridges of the Common " Council, and shall thereafter keep said street in good repair inside " and between the rails of their tracks only during the term of five " years, and whenever it becomes necessary to improve by ordinance, " or otherwise, any of the streets through which their track is laid by " a new or permanent improvement, said company shall not be " required to make any part or portion thereof, nor bear any part
" or portion of the expense of making the same during the
18 " term of five years from the adoption of this ordinance."

Shortly after the adoption of this resolution by the Common Council of the City of Rochester, an Act was agreed upon by the Common Council and approved by the Mayor of the City of Rochester and by the said Rochester City & Brighton Railroad Company and transmitted to the Legislature of the State of New York for enactment by it.

On or about the 12th day of February, 1869, said act was passed by the Legislature of the State of New York and duly signed by the Governor of said State, and is entitled "An Act for the relief of the Rochester City & Brighton Railroad Company," and is known and design-ed as Chapter 34 of the Laws of the State of New York for the year 1869.

A copy of said act is hereunto annexed, marked "A," and made a part of this answer.

Sixth—This defendant further alleges upon information and belief, that in or about the year 1889, the Rochester City & Brighton Railroad Company duly petitioned the Common Council of the City of Rochester for permission to change its motive power from horse to the overhead system of electricity, commonly known as the trolley system.

That the prayer of said petition was duly granted by the municipal authorities of the said City of Rochester, and on or about the 10th

day of February, 1890, the Common Council of said city duly adopted the resolutions which are set forth in full in the contract which is hereto annexed and marked "B," which said contract and resolutions are hereby made a part hereof, and said resolutions were duly approved by the Mayor of said city.

That within the time prescribed by said resolutions the Board of Directors of the Rochester City & Brighton Railroad Com-
19 pany duly adopted a resolution accepting in all things the grant contained in said resolutions of the Common Council, and agreeing to abide by the same, and a certified copy of said resolution was delivered to the City Attorney of the City of Rochester, and duly approved by him and filed in the office of the Clerk of the City of Rochester. That on the 25th day of February, 1890, the Rochester City & Brighton Railroad Company duly executed the contract containing a copy of said resolution of the Common Council, which contract is hereto annexed, marked "B," as hereinbefore stated, and the City Attorney of the City of Rochester duly approved said contract, and the same was duly filed in the office of the Clerk of the City of Rochester.

Seventh—This defendant further alleges, upon information and belief, that the terms and obligations of said resolutions contained in the contract hereto annexed, marked "B," were duly accepted and performed by the Rochester City & Brighton Railroad Company in the manner and form as in the resolutions provided.

That thereafter and on or about the 25th day of February, 1890, the Rochester City & Brighton Railroad Company last above mentioned duly executed and delivered to this defendant a lease, under the corporate seal of said company, of all its property, franchises, rights and privileges, of every kind and description, for the unexpired term of its charter, pursuant to the provisions of the statutes of the State of New York in such case made and provided. That such lease was duly executed under the corporate seal of this defendant and duly submitted to the stockholders of each of said companies at a meeting thereof called separately for the purpose of taking the same into consideration. Due notice of the time and place of holding said meeting and the object thereof was duly given to the stockholders of each of said companies by written or printed notice in the manner and form as by said statutes provided; that said
20 meeting of said stockholders was duly held and said lease was duly adopted, ratified and approved by the votes of stockholders cast in person or by proxy at such meeting.

This defendant duly accepted said lease and thereupon entered into the possession of the demised railroads and property.

Eighth—This defendant further shows upon information and belief that subsequent to said lease and in the year 1890, this defendant, being the lessee of the Rochester City & Brighton Railway Company, duly acquired, pursuant to the statutes of the State of New York in such case made and provided, the entire capital stock of the Rochester City & Brighton Railroad Company, which said capital stock was duly surrendered and transferred

to this defendant and a certificate of such surrender and transfer was duly filed in the office of the Secretary of the State of New York under the common seal of this defendant, to whom such surrender or transfer had been made, and thereupon, pursuant to the statutes of the State of New York in such case made and provided, the estate, property, rights, privileges and franchises of the Rochester City & Brighton Railroad Company were vested in this defendant and are now held and enjoyed by it as fully and entirely and without change or diminution as the same was before held and enjoyed by the said Rochester City & Brighton Railroad Company.

Ninth—That thereafter and in the year 1890, this defendant, pursuant to the statutes of the State of New York, applied to the Board of Railroad Commissioners of the State of New York for permission to change the motive power of the railroad so acquired by it, and of such extensions thereof as were contemplated and as were embraced in its articles of association and in said Act of 1869, from horse power to electricity, and such proceedings were thereupon had that in said year the Board of Railroad Commissioners of the State
21 of New York duly granted such permission to this defendant, and thereafter this defendant, at great expense, proceeded to and did reconstruct the entire railroad of the Rochester City & Brighton Railroad company acquired by it as aforesaid, and equipped the same with electrical appliances.

That in making such change of motive power to electricity as aforesaid, it became and was necessary for this defendant to, and this defendant did, reconstruct in its entirety the road so acquired by it as aforesaid, including the replacing of the ties, rails and foundation with new material and the replacing of all the cars with new motor cars, and this defendant further shows that since the making of the said contract of February 25, 1890, up to the time of the lease to this defendant from the Rochester City & Brighton Railroad Company, the said Rochester City & Brighton Railroad Company duly complied with and performed all the conditions of said contract by it to be performed, and that since the making of said lease this defendant has duly complied with and performed all the conditions and obligations of said contract on its part to be performed.

Tenth—This defendant further alleges that in making the said lease and in acquiring the capital stock of the Rochester City & Brighton Railroad Company and in the conversion of said railroad from a horse railroad to an electrical railroad, and in the reconstruction and re-equipment thereof, this defendant has expended upwards of Four Million Dollars, and that such expenditure was made by this defendant in reliance upon the provisions of said Act of 1869, and in reliance upon said contract, Exhibit "B" hereto annexed, with the said City of Rochester and the resolutions therein embraced, and this defendant further shows that since the passage of said Act of 1869, entitled "An Act for the relief of the
22 Rochester City & Brighton Railroad Company," and up to the year 1899, neither the said Rochester City & Brighton Railroad Company, nor this defendant, has ever been assessed for, or required to pay, any portion of the expense of the permanent im-

provement of any portion of any street, avenue or highway included within the route of its street railroad within the City of Rochester.

And this defendant, upon information and belief, further alleges that after the passage of the Act of 1869, and up to the time of the making of the contract, a copy of which is hereto annexed, marked Exhibit "B," the Rochester City & Brighton Railroad Company had fully complied with the provisions of the Act of 1869 in keeping in repair that portion of the pavement in the streets in which its tracks were laid prescribed in said act, and that since the making of said contract, Exhibit "B," the said Rochester City & Brighton Railroad Company, and this defendant, had fully complied with all the provisions of said contract, including the keeping in repair of said portions of the streets in which its tracks were laid as were required to be kept in repair by the terms of such contract, and in all other respects, and said Rochester City & Brighton Railroad Company and this defendant have fully performed every covenant in said agreement on the part of said Rochester City & Brighton Railroad Company to be performed.

Eleventh—And this defendant further alleges upon information and belief, that prior to the passage of Chapter 252 of the Laws of 1884, the Rochester City & Brighton Railroad Company duly acquired a franchise in those portions of the several streets named and referred to in the several causes of action set forth in the complaint, and in those portions of said streets which are claimed in the several causes of action set forth in the complaint to have been paved by the City of Rochester, and prior to the passage of said act had
23 constructed its railroad in said portions of said streets and was engaged in the operation thereof.

Twelfth—And this defendant further alleges, upon information and belief, that the sole authority for charging this defendant with any portion of the expense referred to in the first cause of action, if any such authority exists, is found in the provisions of Section 98 of the Railroad Law, being Chapter 39 of the General Laws of the State of New York, being Chapter 565 of the Laws of 1890, as amended, which provision of the Railroad Law was enacted long subsequent to the passage of said Act of 1869, a copy of which is hereto annexed, and long subsequent to the making of the contract, a copy of which is hereto annexed, marked Exhibit "B."

And this defendant avers that if said section of the Railroad Law and the provisions thereof, charge this defendant with the expense mentioned and referred to in said several causes of action set forth in the complaint, or any part thereof, then said provision of the Railroad Law is violative of the provisions of subdivision 1 of Section 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts and is violative of the provisions of Section 1 of Article 14 of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

And this defendant further alleges, upon informaton and belief, that if it is charged with the expense mentioned and referred to in the said several causes of action set forth in the complaint or any

part thereof, and made liable therefor, it will result in taking the private property of this defendant for public use, without compensation, in violation of the provisions of the Constitution of the United States.

Thirteenth—And this defendant, upon information and belief, further alleges that at the time of the alleged passage of the
24 ordinances referred to and the alleged service of the notices referred to, and the alleged making of the improvements referred to in each of the causes of action set forth in the complaint, the charter of the City of Rochester, which is a public act, provided in substance that the Common Council of the City of Rochester should have the power to cause the grading, repairing, cleaning, macadamizing or paving of any of the streets in the said city. That whenever, by order of the Common Council, any public improvement, such as paving a street, is to be made, it should be the duty of that body to determine what portion, if any, of the expense thereof, ought to be paid from the city treasury; and what portion, if any, ought to be paid by a local assessment, and to direct that the expense to be paid by local assessment shall be assessed upon all the lots and parcels of lands in proportion to the benefit which each would derive therefrom.

It was further provided by said charter, that before the Common Council shall determine to make any such public improvement, they should cause an estimate thereof to be made and by an entry in their minutes, describe that portion of the city which they deem proper to be assessed for the expense of such improvement, and shall cause a notice to be published in at least two of the daily newspapers printed in the City of Rochester, four days, which notice shall specify such improvement; the estimated expense thereof; the amount to be paid from the public treasury, and the amount to be assessed for the rest of the expense, and shall require all persons interested in such improvements to attend such council at the time appointed in such minutes.

It was further provided that at the time appointed in such notice, the council shall proceed to hear the allegations of owners and occupants of houses and lots situated in the portion of the city
25 so described as aforesaid, and after hearing the same, shall make such further order in respect to such improvement as they shall deem proper.

The charter then provides for the making of the improvement in accordance with the determination of the Common Council, the making of the assessment roll, of the assessment and the collection thereof.

And this defendant further alleges, upon information and belief, that no notice whatever was given to this defendant, nor was any public notice whatever given, of the intention of the Common Council to pass upon and determine the question of the necessity of paving, or repairing, or adjusting to grade, either of the streets or avenues referred to in either of the causes of action set forth in the complaint, nor does Section 98 of the Railroad Act hereinbefore referred to, provide for giving any such notice, and this defendant avers,

upon information and belief, that if said Section 98 of the Railroad Law charged, or renders this defendant liable for, the expense incurred by the plaintiff, mentioned and referred to in either of the causes of action set forth in the complaint, or any part thereof, it violates the provision of subdivision 1 of Article 14 of the Constitution of the United States, in that it denies to this defendant, being within the jurisdiction of the State of New York, the equal protection of the law.

Wherefore, the defendant demands judgment that the complaint herein may be dismissed with costs.

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Defendant,
9th Floor Germ. Ins. Bld., Rochester, N. Y.

26 STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Tom J. Nicholl, being duly sworn, says: I am the Vice-President and General Manager of the defendant; the foregoing answer therein is true to my own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

T. J. NICHOLL.

Sworn to before me this 23rd day of December, 1902.
CHAS. A. EDGERTON,
Com'r of Deeds.

"A."

CHAP. 34.

An Act for the Relief of "The Rochester City & Brighton Railroad Company."

Passed February 27, 1869.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

SECTION 1. The Rochester City & Brighton Railroad Company is hereby authorized and empowered to maintain and operate a railroad in all of the streets of the City of Rochester in which it has a track now laid, and with the permission of the Common Council of said city, in such other streets in said city as it shall elect to use for that purpose; and with the consent of said Common Council to lay a double track in any such street or streets, and the said Company shall not be bound or required to construct and operate a railroad in any street of said city where there is now no track.

27 SEC. 2. Said company, by and with the consent of the Common Council of said city, may at any time hereafter, abandon

the use of any street now used, or which may hereafter be used by it for the operation of its road, and upon such abandonment shall take up its track and restore such street to as good condition as it was before the removal of such track.

SEC. 3. The right to use any real estate or interest therein which the said company has not acquired, and which may be required for the purpose of constructing or operating said road, as hereinbefore authorized, may be acquired by said company in the manner specified in the fourteenth, fifteenth, sixteenth, nineteenth, twentieth and twenty-first sections of the act entitled "An Act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty, except that all the proceedings for any of the purposes authorized by this section, may be had either in the County Court of Monroe County, or in the Supreme Court; and in the petition to the court it shall not be necessary to make any allegations of or reference to any incorporation, capital stock, survey or maps, or of the filing of any certificate of location. And the notices to be published as provided in subdivisions two and five of section fourteen of said act, need not be published in the State paper; and the Court shall appoint three disinterested and competent persons, who reside in the County of Monroe, to act as commissioners, instead of five persons being appointed in the manner provided in section fifteen of this act.

SEC. 4. Said company may, and is hereby authorized to charge, collect and receive from each and every passenger for riding any distance upon its said road, towards or from the intersection of Buffalo street with State and Exchange streets, in said city, the sum of five cents, except that children under twelve years of age shall only be required to pay three cents fare, and children under five
28 years of age, accompanied by parents or other persons having them in charge, shall ride free.

SEC. 5. Said company shall put, keep and maintain the surface of the streets inside the rails of its track, in good and thorough repair, under the direction of the committee on Streets and Bridges of the Common Council of said City of Rochester; but whenever any of said streets are by ordinance or otherwise permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but it shall make its rails in such street or streets conform to the grade thereof.

SEC. 6. This act shall not be construed as in any way impairing the force or effect of the resolution or ordinance of the Common Council of the City of Rochester, entitled "An ordinance in relation to street railroads," passed June twenty-fourth, eighteen hundred and sixty-two, and the amendments thereof, except as it is herein specifically provided.

SEC. 7. This act shall take effect immediately.

"B."

An Agreement, made and entered into at Rochester, New York, on the twenty-fifth day of February, 1890, by and between The Rochester City & Brighton Railroad Company, of Rochester, N. Y., of the first part, and the City of Rochester, a municipal corporation, of the second part, witnesseth as follows:

The said party of the first part does hereby agree to and with the said party of the second part to accept, and in each and every thing and particular comply with, each and all of the provisions contained and made in the following or accompanying resolutions, and the amendments thereto, as adopted by the Common
29 Council of said city on the eighteenth inst., and will pay, at the time or times, and in the manner specified in said resolutions and amendments, the sum or sums of money therein specified, and will, well and truly, at any and all times hereafter, indemnify and protect the said city in the particulars and manner specified in the said resolutions and amendments, and will, well and truly at any and all times, comply with all ordinances and resolutions of said Common Council, not in conflict with said resolutions and amendments, which have been at any time heretofore, or may be at any time hereafter passed, relating to the rate of speed, manner of running cars, general government or use of tracks, removal of ice, snow or dirt, and the general repairs of the streets within and for two feet outside of, and adjoining said company's track or tracks.

Resolved, That the consent and permission of the City of Rochester is hereby granted to the Rochester City & Brighton Railroad Company, its successors and assigns, in addition to the rights, privileges and franchises now possessed by it, to establish, construct, maintain, operate and use the overhead single trolley electric system of motive power, so-called, in the operation of its cars in and upon each and all of the streets, avenues, and public places in the City of Rochester in, along, through and upon which said company has constructed and is now maintaining and operating a street surface railroad, and to construct, set, lay, maintain and use the poles, wires, appliances, and such electrical appliances and apparatus, and to make the underground and surface alterations in and on each and all of the said streets, avenues and public places, so far as necessary for that purpose; but said company, its successors and assigns, shall not have the right to construct and operate said electric railroad in any street until the requisite consents of property owners on such street, avenue or place, and the consent of the Board of Railroad Commissioners of the State of New York shall be obtained as
30 required by law; nor shall any railway or any part or portion of the street surface or sidewalk of any street, avenue or place, be seriously and permanently interfered with, without consent first being had and obtained from the Executive Board of said city, nor shall any sewer or lateral sewer, water pipe or lateral water pipe, or other public underground conduit, be interfered with without such consent first being had.

It is further resolved, that all work of construction and maintenance authorized by this resolution, and all kind and quantity

of material used, and the height, material, form and shape of all poles erected, shall be satisfactory to the special committee of the Common Council of the City of Rochester, on change of motive power of said railroad to electricity, and to its successor, and that the consent and permission hereby granted is subject to the conditions, terms and limitations hereinafter set forth and described, to wit:

First—The single trolley electric system shall be adopted by said company; the trolley wire shall be supported over the center of each track by (1) cross or suspension wires attached to poles placed at or near the curb lines of the streets, or (2) by brackets extending from the poles placed at or near such curb lines, or (3) in such other manner as shall be approved by the said committee. The cross or suspension wires shall be of not less strength than No. 9 iron wire.

Second—Feed wires shall be used, so far as necessary for the operation of the system, in whole or in part, and shall be placed upon the poles to be erected as hereinafter specified, except that the main feed wires, to convey the electric current from the power station to the railroad lines, may be placed upon poles already erected, in case consent be obtained from the said committee, and from the company or companies which have erected or may erect such poles, or upon poles which said railroad company may erect for the purpose, under
31 the direction of said committee, but in the latter case, each and all of said poles shall be erected at or near the curb lines of the streets or avenues. The feed wires used shall be of such number, and their location shall be as approved by said committee, and all feed wires shall be placed on poles as directed by said committee.

Third—The feed wires used shall be wires having the best insulation at any and all times, and all wires used by said company as feed or trolley wires, shall be so placed as to be suspended at least eighteen feet above the surface of the street or avenue, except that a less elevation may be allowed by said committee in passing under bridges or along any street or avenue where necessary.

Fourth—All wires used, except the cross or suspension wires, shall be copper or composition, and supported in such manner as to render the overhead construction strong and free from danger of accident. Whenever required by said committee, the said company shall place guard wire, to prevent the trolley wire from coming in contact, by reason of accident breakage, or otherwise, with electric, telephone, or other wires, and said company shall at all times cause to be maintained sufficient electric current through the guard wires, to ring a bell at the central station, in the event of any wire falling or coming in contact with such guard wire.

Fifth—The poles shall be of wood or iron and each pole erected shall be straight; if of wood, each pole must be pine sawed eight — square, and of such height and dimensions as shall be approved by said committee. Each pole, whether of wood or iron, shall be painted, and at all times kept painted. Each wooden pole shall be set at least six feet below the surface of the street, the distance between the poles shall be at least 100 feet, except on curves, where a less distance between poles may be allowed by said committee, when necessary to insure strong and permanent overhead construction.
32 Said railroad company, its successors and assigns, shall change the location of poles whenever required by said com-

mittee. Said poles shall be used exclusively to string wires thereon, and to support wires thereby for the construction and maintenance of the single trolley, electric system for street railway propulsion; except that the City of Rochester shall have the right to string and maintain wires on said poles for city signal and municipal purposes only.

Sixth—The electric current which said company may use in the operation of its road shall not exceed 500 volts; but said company, its successors and assigns, shall not use the alternating current for the operation of said overhead system, except with the consent of said committee. The said city may, at any time, test and measure the electric current used by said company.

Seventh—Said committee shall have general charge and supervision of the kind and quality of poles to be erected, location of same, and the work of construction by said company.

Eighth—The said city, by its officers of the Fire Department, or Mayor, or a member of the Executive Board, in case of a fire at any time, may cut or otherwise remove any of the wires or poles of said company, wherever necessary, to afford convenient and unobstructed access to and egress from the place of any such fire.

Ninth—Whenever any building is moved through any of the streets or avenues, along or upon which any of said company's wires are strung or poles erected, said company shall, at any time, when directed by said committee, change said wires so as to permit the free and unobstructed use of such street or avenue, for the purpose of moving said building along or upon the same.

Tenth—None of said poles or wires of said company shall,
33 at any time, be erected or strung so as to injuriously interfere with any of the poles, wires or other apparatus connected with the public street lighting, police patrol, or fire alarm systems of said city.

Eleventh—The said construction and maintenance of the said railroads shall at any and all times hereafter be subject to each and all of the conditions hereof, and all work done and materials used at any and all times, in such construction and maintenance shall be in a thorough, workmanlike manner and first-class quality, and suitable in all respects for the purposes of said electric system. It is further resolved that "the consent and permission of the City of Rochester is hereby granted to said company, its successors and assigns, in addition to the rights, privileges and franchises now possessed by it," to establish, construct, maintain, operate and use during the corporate existence of said company, its successors and assigns, instead of the overhead single trolley electric system described in these resolutions, the storage battery system of electric railway propulsion on all of the lines of railroad now being operated by said company, and upon such lines as shall hereafter be lawfully constructed by said company, its successors and assigns, in said city; provided, however, the electric current used in the operation of the storage battery cars, under this grant, be not in excess of 500 volts; and provided further that the motor cars shall be constructed and maintained as to prevent the communication of the electric current from the batteries to any passenger riding thereon.

It is further resolved that the said company, its successors or assigns, shall at any time during its or their corporate existence, if required by the Common Council of said city by a two-thirds vote of all the members elected, with the approval of the Mayor, adopt and use in the operation and maintenance of its or their railroad upon all the streets upon which said railroad now is, and the extensions thereof which shall be made, improvements in electric rail-
34 way appliances and methods of operation in so far as the adoption and use of such improvements shall make the operation of its or their said street railway system more efficient and economical and less objectionable to the public than the appliances and methods then being used. It is further resolved that said company, its successors and assigns, shall, during its or their corporate existence from and after the first day of November, 1892, operate all the lines of said company as now laid out, and such extensions of said lines as shall be constructed and operated hereafter, with double end cars only, of not less length than fourteen feet; and after the first day of November, 1892, said company, its successor and assigns, shall dispense with and thereafter not use, during its or their corporate existence, upon the lines aforesaid, any bob-tail cars whatsoever.

It is further resolved that said company, its successors or assigns, shall at all times fully indemnify and protect said city of and from any and all suits, actions and proceedings that may be brought and maintained or sought to be brought and maintained by any person or corporation for or on account of or by reason of the adoption or maintenance by said company, its successors or assigns, may adopt and use, or anything connected therewith, or any act of omission or commission by said company, its successors or assigns, or any of its agents or servants, at any time or times; and shall whenever requested by said city, or any of its officers, fully defend any and every such action, suit or proceeding. Said city shall, by some of its officers or agents, in the event of any such suit, action or proceeding being brought, give notice to said company, its successors or assigns, and said company, its successors or assigns, shall be allowed to defend or assist and direct the defense of such action, suit or proceeding.

It is further resolved, that before this grant and consent
35 shall become operative, the said company shall deliver to and leave with said committee a written agreement with the city to accept and in each and everything and particular comply with each and all of the provisions contained in these resolutions and to well and truly at any and all times hereafter to indemnify and protect the City of Rochester in the particulars and manner specified in these resolutions, and to well and truly, at all times, comply with all ordinances and resolutions of the Common Council of said city not in conflict herewith, which have been at any time heretofore, or may at any time hereafter be passed relating to the rate of speed, manner of running cars, general government or use of tracks, removal of ice, snow or dirt, and the general repairs of the streets within and for two feet outside of and adjoining said company's track or tracks. Such written agreement, before being executed by said company shall be approved by the city attorney.

By Ald. FEE: Resolved, That the pending resolutions be amended as follows: Strike out the words "seriously and permanently" before the word "interfered" in the portion of the resolution relating to the consent of the Executive Board in the first paragraph of the resolutions. Adopted.

By Ald. FEE: Resolved, That the pending resolutions be amended by striking out the following in the second paragraph, to wit: "Special Committee of the Common Council of the City of Rochester on change of motive power of said railroad to electricty and to its successor," and by inserting in place thereof "proper city authorities," and by striking out the words "said committee" and inserting in place thereof "proper city authorities." Adopted.

By Ald. FEE: Resolved, That the pending resolutions be amended by adding the following:

It is further resolved that from and after the first day of
36 November, 1892, the said company, its successors and assigns shall, during its or their corporate existence, charge no passenger more than five cents for one continuous ride from any point on its road, or on any road or line or branch operated by it or under its control, to any other point thereon, or on any connecting branch thereof, within the limits of the City of Rochester.

It is further resolved that from and after November 1, 1892, the said company, its successors and assigns, shall, during its or their corporate existence, operate all of the main lines of its or their railroad with a conductor upon each car.

It is further resolved that from and after the 30th day of September, 1892, and for a period of fifteen years, said company, its successors and assigns, shall, in addition to the payments required to be made by contracts heretofore entered into between the city of Rochester and said company, pay to the City of Rochester, on the 1st day of November of each and every year during said term of fifteen years, 1 per cent. upon the entire gross receipts of said company, its successors or assigns, and that, from and after the expiration of said period of fifteen years, and during the entire corporate existence of said company, its successors and assigns, it shall pay yearly, on the first day of November, 2 per cent. upon the entire gross receipts of said company, its successors and assigns.

It is further resolved that the work of constructing its railroad, and installing the system provided for in these resolutions, shall be done under the supervision of the proper city authorities of the City of Rochester.

It is further resolved that the grant set forth in these resolutions shall not be binding on said city, unless formally accepted by said railroad company within sixty days in such manner as shall legally bind said company to perform the same on its part, and as shall be approved by the city attorney.

37 It is further resolved that the poles to be erected in the business section of the city shall be of iron.

It is further resolved that the books of said company shall be open to inspection and examination by the treasurer of the City of Rochester, or his duly appointed agent, for the purpose of ascertaining the correctness of any statement by said railroad company as to said

gross receipts; and it is further provided that if the said Rochester City & Brighton Railroad Company, its successors or assigns, fail to comply with any of the provisions of these resolutions, as to the time of construction and beginning the operation of the system permitted by these resolutions, or in respect to the payment of that portion of its gross earnings agreed to be paid to said city, or the exhibition of its books, as above provided, all grants and powers conferred by these resolutions shall cease, and the grant hereby conferred shall become void, except that if the construction of its system of works or its operation shall be stayed by injunction issued on the application of any property owner, or if it shall be delayed by reason of its inability to procure the necessary permission to make such construction or commence such operation on any street, the time of such stay or necessary delay shall not be taken into account as forming any part of the time allowed by these resolutions for such construction or beginning such operation on said street. It is also understood and agreed that nothing herein contained shall be deemed to relieve the railroad company from paying the annual license fee now required to be paid for each car placed upon said road, but the payment hereinafter provided for shall be in addition thereto.

Adopted.

By Ald. FEE: Resolved, That the resolution and grant as amended be and the same hereby are adopted.

The chair announced that all persons desiring would now be heard on the subject before the Council.

38 After hearing all persons appearing, the resolution was adopted by the following vote:

Ayes—Ald. Tracy, Sullivan, McMillan, Fee, Kohlmetz, Lempert, Williams, Shelter, Selye, Hall, Swikehard, Judson, Schroth, Bohrer, Kelly, Thayer—16.

In witness whereof, the said party of the first part has hereunto caused its corporate seal to be affixed, and these presents to be signed by its President at the place, and on the day and year first above written.

THE ROCHESTER CITY & BRIGHTON R. R. CO.

[CO. SEAL.] G. E. MUMFORD, *P't.*

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 26th day of February, 1890, before me, the subscriber, personally appeared George E. Mumford, to me personally known, and he being by me duly sworn, did depose and say: That he is the President of the Rochester City & Brighton Railroad Company; that he resides in the City of Rochester aforesaid; that he knows the corporate seal of such corporation company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation company; and that said instrument was signed and sealed by him, on behalf of said corporation company, by authority of its Board of Directors; and the said Mumford, as such President, duly acknowl-

edged such instrument to be the free act and deed of said corporation company.

P. R. McPHAIL,
Notary Public.

39 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

Case and Exceptions.

This cause came on for trial at a Trial Term of the Supreme Court held in and for the County of Monroe, in December, 1903, Hon. E. A. Nash, presiding.

William A. Sutherland for the plaintiff.

Charles J. Bissell for the defendant.

A jury was waived by both parties.

The following stipulation was offered in evidence:

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

It is hereby stipulated that the following shall be the findings of fact in the above entitled action, with the exception of the
40 finding of fact No. 20, as to which the defendant may offer proof subject to objection by plaintiff.

Dated July 13th, 1903.

WM. A. SUTHERLAND,
Corporation Counsel, Attorney for Plaintiff.
SATTERLEE, BISSELL,
TAYLOR & FRENCH,
Attorneys for Defendant.

Annexed to this stipulation were the facts as found by the court herein and printed in the findings.

JOHN N. BECKLEY sworn in behalf of defendant.

Direct examination:

I reside in Rochester. At one time I was one of the officers of the Rochester City & Brighton Railroad. I was Secretary. At that time it was operated exclusively by horse power. I was actively engaged in negotiating an arrangement with the City of Rochester, that culminated in the ordinance of 1890, and the contract of the Rochester City & Brighton road, providing the terms and conditions

upon which we were to change the motive power from horse to electricity. I was familiar with the provisions of that ordinance and with the contract made by the Rochester City & Brighton Railroad. About that time there was a syndicate formed to take over the stock of the Rochester City & Brighton road. I was at that time a lawyer, practicing my profession. I examined for the syndicate the charter of the Rochester City & Brighton road. I examined the act of 1869, and the various ordinances beginning in 1862, passed from time to time, down to 1889. I examined every act and every ordinance which had been enacted respecting the Rochester City & Brighton Railroad. I disclosed to this syndicate the information I ac-
41 quired. After that they purchased the stock of the Rochester City & Brighton road. They paid for it in cash. About thirteen hundred thousand dollars, a little more than that as I remember. Some of the stock had to be purchased at a higher price than that paid for the majority of the stock. Something over thirteen hundred thousand dollars. Subsequent to that purchase the Rochester Railway Company was organized. Its first President was Mr. Yates, I think. I became President very shortly after it organized. I was Vice-President and Secretary at the time Mr. Yates was made President. The Rochester Railway purchased from the R. C. & B. its capital stock. The Rochester Railway Company took over under a lease all of the property, rights and franchises of the Rochester City & Brighton Railroad Company, the term of that lease being for perpetuity, as I remember it, and the Rochester Railway Company went into the possession under the lease. After it had gone into possession and the contract was entered into by the Rochester Railway Company and the Rochester City & Brighton Railroad Company, providing for the exchange of the stock of the Rochester City & Brighton Railroad Company for stock and bonds on the Rochester Railway Company. Under the terms of the agreement the Rochester Railway Company issued seven shares of its stock and two hundred dollars in its bonds for each one share of the capital stock of the Rochester City & Brighton Railroad Company, thereby—the result of which was to issue and deliver three million five hundred thousand dollars of the capital stock of the Rochester Railway Company, and one million dollars in bonds, for five hundred thousand dollars of the stock of the Rochester City & Brighton Railroad Company, par value. That is my recollection of the arrangement.

I don't think that those bonds that were issued have ever been sold less than par. I couldn't testify as to that. For many years
42 they have been way above par. The stock of the Rochester Railway from the time of its issue down to the present time has ranged in market value from fifteen dollars a share up to seventy-five or eighty dollars a share.

Q. At the time of the purchase of this capital stock about what was the value of the real estate of the R. C. & B., other than its tracks? A. I don't know that I can testify as to that, Mr. Bissell. I can tell you what real estate the company owned at this time, but I don't feel that I am qualified at the moment to express an opinion as to its value. It would not—I can say that the total value of the real estate, including buildings, I suppose?

Q. Including everything except the tracks? A. The total value of the real estate and buildings would not exceed, or did not exceed, at any time two hundred thousand dollars. They had a number of what were known as bob-tailed cars, one hundred seventeen, I think. They were not fit for electric cars. They had a quantity of horses. They couldn't be used on electric road. The cars brought an average price of about twenty-five dollars apiece. I don't think any of them sold for much beyond that and a good many of them sold for less. I think the horses averaged about eighty or eighty-five dollars. There were about eight or nine hundred. The rails in the streets were not proper for an electric railroad. They all had to be changed and new rails put in their place. The foundation had to be changed, and the ties. In reconstruction the ties that were suitable were of course used again—the rails were of no value to speak of. This change from horse power to electricity was gradual, and was completed entirely, I think, in 1892. In addition to the amount paid for the capital stock of the Rochester City & Brighton there was expended by the Rochester Railway in changing from horse power to electricity and in equipping the road with poles, wires,
43 rails, ties, power house, motor car up to 1892, when the change had been practically completed, about three million dollars, between two millions and a half and three million dollars. During the time that I was negotiating for the purchase of the stock of the Rochester City & Brighton and planning to convert the road into an electrical road the provisions of the different ordinances, beginning in 1862 and of the act of 1869, and the charter of the road were the subject of discussion between me and the men who furnished money, the active men in charge of the syndicate, before the purchase was completed of the stock, and before the moneys were expended in making the change. I advised the men in charge or the men who were engineering the purchase, that the act of 1869 and the various ordinances, including the contract of 1890, exempted the Rochester City & Brighton Railroad from paying for new pavements between the rails of its tracks and between its tracks, or any distance outside of its tracks, in those streets in which it obtained its franchise and constructed its road, prior to the passage of the General Railroad Act of 1884.

Cross-examination:

Three men were active in this syndicate, who were conducting these negotiations on the side of the purchasers. They are the ones to whom I gave this advice, and later on to others who were not originally active. Advice was given to Mr. McKee, Mr. Verner, Mr. Richard Clay, as well as to some of our local men, like Mr. George Mumford and others here, who are connected with the syndicate. Originally the negotiations were undertaken for the purchase of the stock of the Rochester City & Brighton Railroad Company by Mr. McKee and Mr. Verner of Pittsburg. After they had examined the physical property and had satisfied themselves with respect to, something as to its value, they came to me and I became associated with

them and at their suggestion I examined the statutes and the
44 ordinances which bore upon the question of the advisability of the purchase. Before any contracts were made for the purchase of the stock, I reported to Messrs. McKee and Verner what my opinion was, based on my examination of the acts and the ordinances. Subsequently McKee and Verner made a contract with the owners of the stock of the Rochester City & Brighton Railroad Company for its purchase and paid a certain amount of money down, the balance to be paid later if further investigations showed that the claims made were right and proper. Before anything was done in the way of closing the transaction, Mr. Cuyler of Philadelphia, with other members of the syndicate which McKee and Verner in the meantime had organized and to the whole syndicate or to such of them as ap-eared, I made the report which I have referred to, with respect to the rights of the Company under the acts of the Legislature and under the ordinances. Subsequently the contract was consummated for the purchase of the stock. That, I think, answers perhaps your question. Everything else simply followed as a result of that. I ought perhaps to add that the advice given or the opinion given, was not specifically with respect to this matter of paving, but it was as to the term of the charter and all other questions which would naturally be considered by purchasers of such a property. Another important question was as to whether there was a limitation upon the term of the extension of the company under its articles and as to the length of time that the franchise was to extend and so on, and among other questions this question of freedom from liability on the part of the company as to the expense of paving.

After the Rochester Railway Company was organized there was not that I remember any further discussion of this question before the transfer was made to the electric power, this specific question of
45 paving. I can't state whether or not this purchase would have been made if this statute of '69 and this ordinance had not been in effect and my opinion given to them? In order to state that, I should be obliged to know what the operation of the minds of the people who formed the syndicate was. It is my opinion that the purchase would not have been consummated at all and when made, if the purchase had been made, the change would not have been made from horse power to electricity, except for the belief, which I certainly had and I believe the other members of the syndicate had, that the company would have been relieved under the acts of the Legislature and under the ordinances, of the liability of payment for the expense of paving between the tracks. I think it would have been too great a burden to have assumed; I think the people would have failed to carry out the arrangements—failed to make the purchase. There was no particular discussion of this specific question as to the paving, before the purchase. The question came up in this way. The Philadelphia people were familiar with the law of Pennsylvania on the subject, and they had had experience in other parts of Pennsylvania, different cities, in connection with matters of this kind, and the question came up sharply, as to whether or not the company, in case it should be taken over and the change made,

whether the company could be called upon to pay this expense of paving, which was recognized would be a very heavy charge. That question came up specifically because of statements made as to what the Pennsylvania law was and what the practice had been in other places with respect to this matter, and I advised the members of the syndicate that under the laws and under our charter and under this ordinance, there would be no liability for the expense of paving between the tracks and two feet outside so far as the tracks had been constructed under the provisions of the law then existing.

Redirect examination:

At the time that the syndicate were negotiating for the purchase, it was contemplated at that time, that if they succeeded in
46 acquiring the entire capital stock, that a company was to be organized under the laws of '84, to take over that capital stock and construct the new road. And the Rochester Railway was thereafter organized. The plan which was subsequently carried out was all made prior to the purchase of the Rochester City & Brighton Railroad. When the Rochester Railway was organized these same men who were members of the syndicate controlled to a large extent its stock.

Recross-examination:

This opinion was given to the syndicate and not to the Rochester Railway Company.

I, Edwin A. Nash, Justice of the Supreme Court before whom the above entitled action was tried, do hereby certify that the foregoing case and exceptions contain all of the evidence given, and proceedings had, on the trial herein, and I do hereby settle the same and order it filed in the office of the Clerk of Monroe County.

E. A. NASH,
Justice of the Supreme Court.

Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

In the above entitled action, tried before the Court without a jury, at the December, 1903, Monroe Trial Term, held at the Court House in the City of Rochester, the case was duly moved for trial
47 and a jury waived by the parties in open court, and the action tried by the court, and the court having heard the proofs and allegations of the parties and the admissions of fact made by the several parties upon the trial and by written stipulation filed with the court, and the court having heard the argument of counsel, makes the following findings of fact and conclusions of law:

Facts.

I.

That the plaintiff is a municipal corporation, duly incorporated as a city under and by virtue of the provisions of an Act of the Legislature of the State of New York, passed in the year 1834, being Chapter 199 of the Laws of 1834. That thereafter and prior to the year 1861, a number of acts were passed by the Legislature of the State of New York, amending Chapter 199 of the Laws of 1834, and in the year 1861, the Legislature of the State of New York passed Chapter 143 of the Laws of that year, amending and consolidating Chapter 199 of the Laws of 1834 and the several acts amendatory thereof. That thereafter the Legislature passed several acts amending Chapter 143 of the Laws of 1861, and in the year 1880, the Legislature of the State of New York passed Chapter 14 of the Laws of 1880, amending and consolidating Chapter 143 of the Laws of 1861, and the several acts amendatory thereof. That heretofore the Legislature of the State of New York passed a number of acts amending Chapter 14 of the Laws of 1880, all of which acts beginning with Chapter 199 of the Laws of 1834, are declared to be public acts. That the charter of said City of Rochester was further amended by the passage by the Legislature of the State of New York of Chapter 182 of the Laws of 1898, known as the Charter for cities of the second class, and said City of Rochester is, and at all times since the enactment of said Chapter 182 of the Laws of 1898 was, a city of
48 the s-*ocn*d class in the State of New York, and subject to the provisions thereof, and since the passage of Chapter 182 of the Laws of 1898, the Legislature of the State of New York have passed several acts amendatory thereof, all of which acts are public acts.

The Rochester City & Brighton Railroad Company was a street surface railroad corporation, duly incorporated on or about the 31st day of May, 1862, under and pursuant to the provisions of an Act of the Legislature of the State of New York, entitled "An Act to authorize the Formation of Railroad Corporations and to regulate the same, passed April second, 1850, and the several Acts amendatory thereof." Said Act of 1850 being known and designated as Chapter 140 of the Laws of the State of New York of that year. Said corporation was incorporated for the purpose of constructing, maintaining and operating a street surface railroad from a point in the Town of Brighton, Monroe County, through various streets in the City of Rochester, named in its Articles of Association as set forth in the second finding herein, into the Town of Greece, Monroe County, New York.

That between the 27th day of February, 1869, the date of the passage of Chapter 34 of the Laws of 1869 hereinafter referred to, and the 7th day of May, 1884, a number of streets in which the Rochester City & Brighton Railroad Company had constructed and was operating and maintaining its street railroad in the City of Rochester, were improved by a new pavement under the provisions of

the existing charter of the City of Rochester and the entire expense of such improvement assessed upon the property owners owning property abutting upon such street. That between the 6th day of May, 1884, and the 1st day of May, 1891, the date that the General Railroad Law of the State of New York took effect, many streets in the City of Rochester in which the Rochester City & Brighton
49 Railroad Company had constructed and was operating and maintaining a street railway, were improved by the making of a new pavement under the then existing charter of the City of Rochester, and the entire expense thereof assessed upon the abutting property owners upon such street. That between the 1st day of May, 1891, and the 16th day of March, 1897, many streets in the City of Rochester in which the Rochester City & Brighton Railway Company, prior to the 6th day of May, 1884, and after that date and prior to the 1st day of May, 1891, and in which the defendant, after the date of the lease hereinafter referred to by the Rochester City & Brighton Railroad Company to the defendant, had constructed, operated and maintained a street railway, were, under the charter of the City of Rochester as it then existed, improved by the making of a new pavement and the entire expense of such pavement was, under such existing charter, assessed against the property owners whose property abutted upon such several streets.

II.

That on the 24th day of June, 1862, pursuant to the provisions of the said Act of 1850, the Common Council of the City of Rochester, a municipal corporation created by and under the laws of the State of New York, granted by resolution and ordinance, to the said Rochester City & Brighton Railroad Company, its consent to the maintenance, construction and operation of its railroad in and through the streets and avenues of the City of Rochester, designated in its articles of association. And in and by such ordinance, it was among other things provided as follows:

"Resolved, that the Common Council of the City of Rochester will permit to be constructed in said City, by the Rochester City & Brighton Company, a corporation organized under and by the authority of the General Railroad act passed April 2nd, 1850, and the several acts amending the same, a railroad which shall commence
50 in the Town of Brighton, Monroe County, to run along the Brighton Road to East Avenue in said City, along East Avenue, Main and Buffalo Streets and West Avenue to the Town of Gates; also from East Avenue along and through Prince Street to University Avenue and through University Avenue to Main Street; also from University Avenue along Main Street to East Avenue; also from the Town of Brighton through Mt. Hope Avenue to and through Clarissa Street to Greig Street; also through Greig Street to and through Plymouth Avenue to Buffalo Street; also from Clarissa Street to and through Exchange Street to Buffalo Street; also from Buffalo Street through State Street and Lake Avenue, so-called, into the Town of Greece; also from the junction of Clarissa Street and Mt. Hope Avenue, through said Avenue and through South and

North St. Paul Streets to the Town of Irondequoit; also from Main Street through Clinton Street to Monroe Avenue and through Monroe Avenue to and through Alexander Street to East Avenue; also from Main Street through North Clinton Street to the Town of Irondequoit, to be constructed, established, maintained and operated upon the terms, conditions and stipulations hereinafter prescribed."

"SECTION 2. The track of the said railroad shall be so laid as to permit the passage of vehicles and carriages over the same, and the rails shall be laid even with the surfaces of the streets and shall conform to the grades thereof as now established, or as they shall from time to time be established or altered. Said Company shall, under the terms of and as required by the Common Council of the City of Rochester, improve with suitable material as such Common Council shall direct, and in a proper manner, between its tracks, the rails of its tracks, and for two feet and four inches outside thereof and shall keep the surface of the street inside the rails and for two feet and four inches outside thereof in good repair, and all dirt
51 and filth removed therefrom as may be directed and required by the said Common Council."

"SECTION 6. The Said Railroad Company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road on the same continuous route, a sum not exceeding five cents, except children under five years of age accompanied by parents or other persons having them in charge, such children to ride free."

"SECTION 17. It is hereby reserved to the Common Council of the City of Rochester the right to make such further orders, rules and regulations, in relation to the construction, repairs and operation of said railroad as from time to time may be deemed necessary to protect the interests of said city and the safety, welfare or accommodation of the public. But no alteration of these rules shall be made which shall have the effect to impair the substantial rights of said Company.

SECTION 19. In case said Company shall fail to keep said streets and avenues in which their said railroad shall be laid in repair, as herein provided, and shall neglect to make such repairs for two days, after notice in writing from the street commissioners or other officers having supervision of repairs of streets or avenues, served upon the superintendent or other managing officers of said railroad, specifying the repairs, the said Common Council shall have the right to cause such repairs to be made, and to assess the expense thereof upon the property of said Company, or sue for and collect the same of said Company.

And in case said Company shall fail to comply with any of the rules and regulations of the Common Council herein contained or provided for, the said Company shall pay to the city a penalty of twenty-five dollars for each and every violation, and if the said Company shall refuse or neglect to comply with any of such rules and regulations, after notice served in writing on the superintendent or other managing officer of said railroad requiring com-
52 pliance, the said company shall pay to the city an additional penalty of twenty-five dollars for each and every day during which such violation is continued.

Provided, however, that an action for such penalty or penalties shall be brought within two months from the time of such violation."

Such ordinance contained various other provisions providing for the kind of track and manner in which the cars should be run; providing for a license fee of five dollars for each car used upon such railway and providing that the grant should be formally accepted by the Railroad Company within sixty days from the date of the passage of the resolution, in such manner as should be approved by the City Attorney of said City.

III.

That thereafter and on the 8th day of July, 1862, said Rochester City & Brighton Railroad Company duly accepted the grant, subject to the provisions and restrictions therein contained, and such acceptance was duly approved by the City Attorney of the City of Rochester.

IV.

That on or about the 16th day of October, 1862, said Rochester City & Brighton Railroad Company duly executed and delivered to Hobart F. Atkinson, as trustee, a mortgage on all its property, rights, privileges and franchises to secure an issue of bonds of the face value of one hundred thousand dollars, which mortgage was duly recorded in the office of the Clerk of the County of Monroe in the State of New York, in Liber 108 of Mortgages at page 217.

V.

That after the acceptance of said franchise from the City of Rochester, and before default in the fulfillment of the condi-
53 tions of said mortgage, as hereinafter stated, the Rochester City & Brighton Railroad Company proceeded to and did construct its said railroad in a number of the streets named in the said resolution of the Common Council, and in its Articles of Association, and in so doing expended a large amount of money, but the exact amount of which does not appear; and thereafter it operated its cars thereon, and duly complied with all the provisions of said ordinance.

VI.

That after the making of the mortgage hereinbefore referred to, default having occurred in the fulfilment of its conditions on the part of said mortgagor, an action was duly commenced by said Hobart F. Atkinson, as trustee, in the Supreme Court of the State of New York, for the foreclosure of said mortgage and that such proceedings were thereafter duly had in said action as that a decree of foreclosure of said mortgage and for the sale of the mortgaged property, franchises, rights and privileges of the said Rochester City & Brighton Railroad Company, was duly made and entered in said Supreme Court and on or about the 28th day of February, 1868, under and pursuant to said decree said property, rights, privileges, franchises and interests of said Rochester City & Brighton Railroad Company

were duly sold and the same was duly purchased by Chauncey B. Woodworth, to whom the same was duly conveyed by the officer making such sale, which conveyance was duly recorded in the office of the Clerk of the County of Monroe.

VII.

That on or about the 5th day of March, 1868, the said Chauncey B. Woodworth, purchaser at said foreclosure sale, pursuant to the statutes of the State of New York in such case made and provided, duly associated with himself as such purchaser at such foreclosure sale, certain individuals, and duly filed in the office of the
54 Secretary of State articles of association reciting, among other things, as follows: "Now, therefore, the persons whose names are subscribed hereto, hereby associate themselves together and form a company by the name of the Rochester City and Brighton Railroad Company, for the purpose of making and operating a railroad in the City of Rochester, heretofore constructed, maintained and operated by the said Rochester City & Brighton Railroad Company, a corporation organized as aforesaid, on the 31st day of May, 1862, in and through the streets wherein said railroad is now laid and run, and in and through such other streets as the public interests may hereafter require, and such other tracks, side-tracks, switches and turnouts as such public interests may from time to time demand. The said company is to continue ninety-nine years."

Said articles of association were duly subscribed by the said Chauncey B. Woodworth and the persons associated with him and contained the statements required by the statutes of the State of New York, in such case made and provided.

VIII.

That immediately after the incorporation of the Rochester City & Brighton Railroad Company, by the said purchaser on said foreclosure sale, and his associates, the said railroad company duly petitioned the Common Council of the City of Rochester protesting against the onerous conditions of Section 2 of the said resolution of 1862, granting the consent of the Common Council and setting forth the inability of the new corporation to proceed with the operation of the railroad, subject to such conditions, and the fact that the railroad had never paid owing to the existence of such conditions. That thereafter and for a space of upwards of a year, the question was debated in the Common Council, committees appointed and various hearings had and proofs offered by the company as to the expense of
55 building, maintaining and operating the road, and finally, on the 12th day of January, 1869, the Common Council of the City of Rochester duly amended Section 2 of the ordinance of 1862, so as to read as follows: "The track of said railroad shall be laid so as to permit the free passage of vehicles and carriages over the same and the rails shall be laid even with the surface of the streets and shall conform to the grades thereof as now established, or as they shall from time to time be established or altered. Said Company

shall, as soon after the adoption of this ordinance as the condition of the streets through which their track is laid will permit, put the surface of said streets inside the rails and for one foot outside thereof, in good and thorough repair under the direction of the Committee on Streets and Bridges, of the Common Council, and shall thereafter keep said streets in good repair inside its tracks or between the rails of their track, only during the term of five years, and whenever it becomes necessary to improve by ordinance or otherwise, any of the streets through which their track is laid, with a new or permanent improvement, said Company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of making the same, during the term of five years from the adoption of this ordinance."

And on the same date, the Common Council amended Section 6 of said ordinance of 1862, so as to read as follows:

"Said Company may charge and collect from every person on entering any of their cars or carriages, for riding any distance upon said road, to or from the extremities at either railway depot, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge. Such children to ride free and except also that said Company shall not charge nor receive from children under twelve years of age, more than three cents for any of above distances."

56 IX.

That very shortly after the adoption of the resolutions referred to and set out in number 8 above, an Act was drawn by the Rochester City & Brighton Railroad Company, a copy of which act was transmitted to the Common Council of the City of Rochester by the Mayor of said city, with a written request that said Common Council by resolution approve and direct the clerk to transmit the bill to the members of the Senate and Assembly, with the request that they procure its passage. That thereafter the Common Council of the City of Rochester duly passed the following resolution:

"Resolved, That the clerk of this Board be authorized to transmit a copy of the bill relating to street railroads presented by the mayor to this Board, to the Legislature requesting that body to legalize the action of the Common Council by the passage of said bill."

That on or about the 12th day of February, 1869, said act was passed by the Legislature of the State of New York, and duly signed by the Governor of said State and is entitled, "An Act for the relief of the Rochester City & Brighton Railroad Company" and is known and designated as Chapter 34 of the Laws of the State of New York, for the year 1869.

That a true copy of said Act is annexed to the defendant's answer herein, marked "A," to which reference is hereby made.

X.

That thereafter the said Rochester City & Brighton Railroad Company continued to maintain and operate its street surface railroad under the general statutes of the State of New York and with the

consent of the Common Council (to) extended its railroad into many other streets and parts of streets in (said) the City of Rochester, incurring thereby large expenses and expending large sums of
57 money therefor, the exact amount of which does not appear.

That it kept in repair the pavement between its tracks, the rails of its tracks and for one foot outside thereof, but whenever a street was improved by a new pavement it was never called upon by the authorities of the City of Rochester to make or pay for any part of such improvement. That on the 18th day of May, 1880, the Common Council of the City of Rochester reenacted the ordinance of 1862, as amended in 1869.

XI.

That on the 29th day of March, 1887, the Common Council of the City of Rochester passed an ordinance in relation to street railroads, which ordinance so passed was as follows:

"SECTION 1. Every street surface railroad within the City of Rochester shall consist of a single track to be laid in the center of the streets or avenues through which the same is or may be designed to run, unless the Common Council shall otherwise direct in respect to some of the wide streets or avenues, with necessary turn outs, side tracks and switches, and to be constructed with the improved broad rail, of the most approved kind and weight, five inches face, not to exceed three-quarters inch raised edge, to be laid flush with the surface of the street or avenue, and four feet and ten inches apart between the raised edges, so as to accom-odate the most common width of carriage wheels, and to be laid on suitable timbers, with suitable crossties, unless otherwise permitted or directed by the Common Council, under the direction of the Executive Board."

"SECTION 2. The track of said railroad shall be so laid as to permit the free passage of vehicles and carriages over the same, and the rails shall be laid even with the surface of the streets and avenues,
58 and shall conform to the grades thereof, as now established, or as they shall from time to time be established or altered. As soon after the adoption of this ordinance as the condition of the streets and avenues, through or along which any street surface railroad track is now laid will permit, the surface of such streets and avenues inside the rails of all tracks authorized to be laid prior to May 6th, 1884, and between the tracks and rails of such tracks and for a space two feet in width outside and adjoining the outside rails of the tracks of any and all extensions or branches of any railroad authorized to be constructed since May 6th, 1884, shall be put in good and thorough repair by the company, under the direction of the Executive Board of said city, and thereafter at all times the same shall be in like manner and degree kept and maintained; as to tracks authorized to be constructed or laid prior to the 6th day of May, 1884, the surface of said streets and avenues inside and between the rails thereof; and roads and any and all extensions and branches of any roads authorized to be constructed or laid since May 6th, 1884, between the tracks and the rails of the tracks, and a space two feet in width outside and adjoining the outside rails of the track or tracks."

"SECTION 3. During the operation of laying rails a free passage

for carriages and other vehicles over and along the streets and avenues in which such track laying be done, shall be kept open, and immediately after the rails shall be laid, the pavement, flagging and other materials necessarily removed in laying the same shall be replaced in a good and substantial manner and the street or avenue be placed or put in as good condition as before such removal or track laying, and the surface of the pavement made flush with the rails, and no portion of the pavement or surface of the streets or avenues shall be kept broken or distrurbed for a greater time than five days. And all surplus street material shall be carefully removed by said company laying such track."

59 "SECTION 4. The cars to be used on any such railroad shall be drawn by horses or mules only, at a speed not exceeding the rate of seven miles per hour, and shall run as often as once in every fifteen minutes between the hours of 6 o'clock in the morning and 12 o'clock midnight, upon all routes now or hereafter constructed, except the Lake Avenue route from Driving Park Avenue to the Ridge Road, and the lines hereafter constructed in the Fifteenth or Sixteenth wards, and upon those lines as often as once in every half hour, of each and every day hereafter; and the cars upon each and all the routes shall commence running and shall run and start from the Four Corners, so-called, or the junction of West Main, State and Exchange streets in the manner and at the times aforesaid. The company or companies while they comply with the requisitions in respect to the running of their cars above referred to, may run their cars as much oftener as they shall choose either on the whole length or over a portion or portions of their said road."

"SECTION 5. There shall be posted in each car, in a conspicuous place therein, a plainly printed copy of the rates of fare or charges allowed by law to be charged or received for the transportation of passengers by the company running or operating such car; and there shall also be posted in a conspicuous place in each car a plainly printed or painted sign containing the number of the car and the name of the route or routes on which the car is then run and so as to be easily read by any person on entering the car."

"SECTION 6. No car shall be allowed to stop on a crosswalk nor in front of an intersecting street, except as shall be necessary to avoid collisions, or to prevent danger to persons in the street."

"SECTION 7. When the conductor of any car is required to stop at the crossing of any two streets to receive or land passengers, the car shall, if convenient, be stopped so as to leave the plat-

60 form slightly over the crossing."

"SECTION 8. It shall be the duty of the company, or Companies, to employ careful, sober and prudent agents, conductors and drivers, to take charge of their cars while on the road, and it shall be the duty of such agents, conductors and drivers, so far as the same is practicable, to keep a vigilant watch for all teams, carriages and persons on foot, and especially children, and at the first appearance of danger to such teams, carriages, footmen, children or other obstructions, the car or cars shall be stopped in the shortest time and space practicable. The company or companies

may, in their discretion, run cars without any other conductor than the driver."

"SECTION 9. The conductors shall not allow women or children to enter or leave the cars while in motion."

"SECTION 10. Conductors shall announce the names of the principal streets and avenues as the car reaches them."

"SECTION 11. Whenever it shall be necessary to remove any snow or ice from the track or tracks from said road or roads, the same shall be done by the company owning and operating such road in such manner, and so carefully and evenly spread on the street or avenue, as not to obstruct the free passage of sleighs or vehicles upon or along said street or avenue, or in crossing the same, or by foot passengers at crossings, and no salt or brine shall be used for the purpose of removing snow or ice from said track or tracks, or the rail or rails thereof, except at curves, switches or turntables, and there only and barely sufficient for the purpose of removing snow or ice from, and to be carefully and only placed upon such rail or rails. Any company or corporation or person, violating any of the provisions of this section shall be subject and liable to pay a fine or penalty of twenty-five dollars for each offense."

"SECTION 12. It is hereby reserved to the Common Council of the City of Rochester the right to make such further orders, rules and regulations, in relation to the construction, repairs and operations of any street surface railroad now, or hereafter to be, constructed, maintained and operated, as from time to time may be deemed necessary by said Common Council to protect the interests of said city, and the safety, welfare or accommodation of the public. But no alteration of these rules shall be made which shall have the effect to impair the substantial rights of such company or companies."

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"SECTION 13. Wherever gas or water pipes, or sewers, are now laid in any street or avenue, said railroad or railroads must be laid down and maintained subject to the rights over the same now in the city, and the gas and water companies, and the Executive Board of said city to take up, alter, repair or remove said pipes or sewer in such manner as not unreasonably to damage or injure said railroad or railroads, or its or their use, without claim upon or to said city, gas or water companies, or said Executive Board, or its successor, and the Common Council expressly reserves to itself the right hereafter to lay down, or cause or permit to be laid down, in said streets or avenues, gas or water pipes, or sewers, and to alter, improve and repair said streets or avenues, whenever the public or private good or convenience may require.

"Gas or water companies, or private individuals, who shall take up the pavement, or excavate the street for the purpose aforesaid, being always required, as by the present city ordinances, to restore the street to its former condition."

"SECTION 14. In case any street surface railroad company now or hereafter incorporated and operating and maintaining any road within the City of Rochester shall fail to keep the streets and avenues

in which their said railroad shall be laid in repair, as herein provided, and shall neglect to make such repairs for five days,
62 after notice in writing, from the Executive Board of said city, or other officer or officers having the supervision of repairs of streets or avenues within said city, served upon the superintendent or other officer of said railroad, specifying the repairs, the said Common Council and said Executive Board, or either of them, shall have the right to cause such repairs to be made, and the expenses thereof may be assessed upon the property of said company or sued for and collected in the name of and on behalf of the City of Rochester from said company so neglecting as aforesaid."

"SECTION 15. And in case any company, and each and every of its agents, servants, conductors and drivers who shall fail to comply with, or shall violate any of the provisions of any of the sections of this ordinance, it and them or him shall forfeit and pay a fine or penalty of not less than ten dollars and not more than one hundred dollars, for each and every such violation; and if the said company shall refuse or neglect to comply with any of the rules and regulations hereinbefore made or imposed upon it, after notice served in writing on the superintendent or other officer of said company, requiring compliance as herein provided, the said company shall forfeit and pay a further and additional fine or penalty than one hundred dollars, for each and every day during which such violation is continued."

"SECTION 16. Should any company fail to complete its railroad, or to commence running its cars thereon within one year after the construction thereof is begun, or should any company neglect to run cars on its road after the completion thereof, for the accommodation of the public, as provided by the rules and regulations of this ordinance, for the space of two consecutive months, then such company shall forfeit all privileges and rights which they may have acquired heretofore or hereafter by any grant, or use or possession of any of the streets or avenues within said city, upon which such cars are not so run; and in such case the City of Rochester reserves
63 the right, by its Common Council, to cause all obstructions and materials placed in said streets or avenues by said company to be removed therefrom, and said streets and avenues put in as good condition and repair as they were before said materials and obstructions were placed therein, and the expense thereof shall be paid to said city by such railroad company; and said city, also, in such cases reserves the right to grant the same rights and privileges to any other person or persons, corporation or corporations, in the manner now, or hereafter, prescribed by law, free from all charge or liabilities for damage on account thereof."

"SECTION 17. If by reason of any act, omission or neglect of any railroad company, its officers or agents, the corporation of the City of Rochester, shall, or may be subjected to any damages or liability, the said company shall be liable to the said city to the same extent."

"SECTION 18. Each and every street surface railroad company or corporation now or hereafter incorporated and operating and maintaining any road within the City of Rochester shall, and it

hereby is required to pay to the treasurer of the City of Rochester, for the use of the city, five dollars per annum for each car or carriage owned or operated by them, and every such company shall obtain from the mayor of the city a license for each of said cars or carriages, which it shall be his duty to grant without fee or reward, on the production of the treasurer's receipt for such payment; and provided, further, that such license shall, in every case, expire on the thirty-first day of March in each year, and that any company or corporation now operating and maintaining any road within said city shall pay such fee and obtain such license within thirty days from the date of the passage of this ordinance, and the same to begin on April 1, 1887. The president or managing officer and secretary of such, and every such company or companies shall, on or before the first Monday in April of each year, commencing the first Monday of April, 1887, furnish to the Common Council of said city, a full and complete list of all the cars or carriages owned and operated by the company, and such statement shall be verified by the oath of the said president or managing officer and secretary, to be administered by a notary public of Monroe County, and attested by his seal, and the city clerk shall notify every such company or corporation of such requirement, and every such corporation or company, or the president or managing officer or secretary thereof, who shall fail to pay such fee and obtain said license, or who shall fail to make such report and list at the time and in the manner above specified, shall be liable to pay a fine or penalty of not less than ten dollars, nor more than fifty dollars, and a further penalty of the same amount for each and every twenty-four hours such neglect shall continue."

64

"SECTION 19. Whenever any company shall, for any reason, remove from their tracks, or any portion of the adjacent roadways, at any street corner, or street intersection, except by means of a plough, scraper, or otherwise, as is authorized or permitted to be done by section eleven of this ordinance, or shall remove, in any manner, from their tracks, or any portion of the adjacent roadway, at what is commonly known as the "Four Corners," or the intersection of West Main Street with State and Exchange Streets, and of East Main Street with North and South St. Paul Streets, any dirt, dust, filth, snow or ice, the same shall be removed from such street or avenue entirely by said company, without delay; and if the same is deposited, and not immediately removed, as aforesaid, it shall be immediately removed by the Executive Board of the city, and the cost and expense of such removal shall be paid by the company so offending, and, in addition thereto, for the violation of this section, such offending company shall be liable to a fine or penalty of fifty dollars for each offense, and a further penalty of fifty dollars for every twenty-four hours such violation shall continue."

65

"SECTION 20. Whenever any company shall for any reason remove from their tracks, or any portion of the adjacent roadways at any street corner or street intersections, including what is commonly known as the "Four Corners," and the intersection of

St. Paul streets with East Main street, any dust, dirt, filth, snow or ice, the same shall be taken away from the street entirely by said company without delay, and shall not be deposited upon the sides of any other portion of the street surface, and if the same is deposited contrary to the provisions hereof, the same may be immediately removed by the Executive Board of the city and the cost and expense thereof shall be paid by the company so offending, and in addition thereto for the violation hereof, such offending company shall be liable to a fine or penalty of fifty dollars for each offense, and a further penalty of fifty dollars for every twenty-four hours such violation shall continue."

"SECTION 21. The penalties prescribed for the violation of any section of this ordinance shall not in the aggregate exceed the sum of one hundred and fifty dollars for any specific violation thereof, anything hereinbefore to the contrary notwithstanding."

"SECTION 22. Every execution issued upon a judgment recovered for a violation of this ordinance, or any provision thereof, except as hereinbefore otherwise specially provided, shall command the amount to be made of the property of the defendant, if any such can be found, and, if not then to commit the defendant to the Monroe County penitentiary; and any person violating any provision of this ordinance and failing to pay the penalty, or fine imposed therefor, shall be imprisoned in said penitentiary for a term of not exceeding one hundred days."

"SECTION 23. This ordinance shall take effect immediately."

66 XII.

That on or about the 21st day of January, 1890, the Rochester City & Brighton Railroad Company duly petitioned the Common Council of the City of Rochester for permission to change its motive power from horse to the overhead system of electricity, commonly known as the "trolley system."

That the prayer of said petition was duly granted by the municipal authorities of said City of Rochester and on or about the eighteenth day of February, 1890, the Common Council of the said City of Rochester duly adopted the resolutions which are set forth in full in the contract which is annexed to the answer and marked "B," which said contract and the resolutions therein set forth are true copies of the resolutions so passed, and of the contract accepting such resolutions, hereinafter referred to, and are hereby referred to and made a part hereof.

That within the time prescribed by such resolutions, the Board of Directors of the Rochester City & Brighton Railroad Company duly adopted a resolution accepting in all things the grant contained in said resolutions of the Common Council and agreeing to abide by the same and a certified copy of said resolutions of said Board of Directors was delivered to the City Attorney of the City of Rochester, and duly approved by him and filed in the office of the Clerk of the City of Rochester. That on the 25th day of February, 1890, the Rochester City & Brighton Railroad Company duly executed the contract containing a copy of said resolutions of the Common Council,

which contract is annexed to the answer herein marked "B" and hereby referred to as a part hereof and the City Attorney of the City of Rochester duly approved said contract and the same was duly filed in the office of the Clerk of the City of Rochester.

67 XIII.

That on or about the 17th day of September, 1872, permission was granted to the Rochester City & Brighton Railroad Company by the Common Council of the City of Rochester, to lay its tracks in North St. Paul Street, from Main Street to Ward Street; said Ward Street being beyond the New York Central crossing, provided the said railroad company should pave two feet each side of the track with Medina stone pavement, from East Main Street to the center of Ward Street. That on the 17th day of May, 1881, permission was duly granted by the Common Council of the City of Rochester to the Rochester City & Brighton Railroad Company, to lay its tracks in Park Avenue, from Alexander Street to a point beyond Meigs Street. That both North St. Paul Street and Park Avenue, at the time such permission was granted to the Rochester City & Brighton Railroad Company, were and each was, and each of them ever since has been, a public street in the City of Rochester. That prior to the 6th day of May, 1884, the said Rochester City & Brighton Railroad Company constructed its said road in such parts of said streets and was engaged in operating the same on said day.

XIV.

That after the passage of said resolutions and the making of said contract containing said resolutions, a copy of which is annexed to the answer and marked "B" and is referred to in the twelfth finding herein, the said Rochester City & Brighton Railroad Company performed the terms and obligations of said resolutions in manner and form as in said resolutions provided, but it never, constructed or paid for any portion of any new pavement in any street or streets, through which it maintained and operated its railroad, and the question as to whether it was bound to do so, under said ordinance and contract, is to be determined in this action as a question of law.

68 XV.

That the defendant in this action is a domestic street surface railroad corporation duly incorporated under an Act of the Legislature of the State of New York, entitled "An Act to provide for the construction, extension, maintenance and operation of Street Surface Railroads and Branches thereof in such Towns and Villages," passed May 6th, 1884, said Act being known as Chapter 252 of the Laws of the State of New York for that year with a capital stock of 5,000 shares of the par value of $100 each. That under and pursuant to the provisions of said Act, it filed its articles of association in the office of the Secretary of State of New York, on the 25th day of February, 1890, and that the route designated in its articles of association comprises, with other routes, the route designated

in the articles of association of the Rochester City & Brighton Railroad Company, and all of the streets into which said Rochester City & Brighton Railroad Company extended its lines, and included both of the streets mentioned and referred to in the complaint in this action.

That on the 6th day of September, 1889, a franchise and permission was duly granted by the local authorities of the City of Rochester to the Crosstown Railroad Company of Rochester, N. Y., a corporation organized and incorporated on the first day of April, 1889, under and pursuant to Chapter 252 of the Laws of 1884, to construct, maintain, and operate by electric power, lines, branches and extensions of its street surface railroad in, upon, through and along the following streets, avenues and highways in the City of Rochester, commencing on Scio Street at its intersection with German Street; thence along German Street eastwardly to Alexander Street; thence across Alexander Street to the westerly end of Central Park; thence along Central Park through the parkway between the two roadways to Goodman Street, which franchise and permission was granted "upon the express condition that
69 the provisions of Chapter 252 of the Laws of 1884 of the State of New York pertaining to this consent be complied with," and "upon the express conditions, restrictions, limitations and provisions set forth in Chapter 252 of the Laws of 1884." That thereafter and on the 10th day of March, 1890, the said Cross Town Railroad Company of Rochester, N. Y., entered into an agreement with the Rochester Railway Company, the defendant herein, whereby and wherein the said Cross Town Railroad Company granted, demised and leased to said defendant, its railroad, cars, rights of way, real estate, rights, privileges, franchises and property of every description, and by said Cross Town Railroad Company, and for and during the entire corporate existence of said Cross Town Railroad Company. That on the 24th day of September, 1899, a franchise and permission was duly granted by the local authorities of the City of Rochester to the South Park Railroad Company of Rochester, N. Y., a corporation duly organized and incorporated on the first day of April, 1889, under and pursuant to Chapter 252 of the laws of 1884, to construct, maintain, operate by electric power and use, lines, branches and extensions of a street surface railroad, in, upon, through and along the streets, avenues and highways hereinafter named, commencing at the intersection of the center line of Church Street with the center line of North Fitzhugh Street; thence along Church Street westerly to the center line of Sophia Street; thence along Sophia Street to the northerly line of West Main Street; thence across West Main Street and along Plymouth Avenue to the center line of Spring Street; thence along Spring Street to the center line of South Fitzhugh Street; and also commencing at Pinnacle Avenue, at the intersection of said avenue with Meigs Street; thence southerly along Pinnacle Avenue to the city line of the City of Rochester, together with the necessary turnouts, branches, switches, turntables and crossovers, and single and double curves,

for the convenient operation of said railroad, which franchises
70 and permission was granted "upon the express condition that the provisions of Chapter 252 of the Laws of 1884 of the State of New York, pertaining to this consent be complied with;" and "upon the express conditions, restrictions, limitations and provisions set forth in Chapter 252 of the Laws of 1884."

That thereafter and on the 10th day of March, 1890, the said South Park Railroad Company of Rochester, N. Y., entered into an agreement with the Rochester Railway Company, the defendant herein, wherein the said South Park Railroad Company granted, demised and leased to the defendant, the railroad, cars, rights of way, real estate, rights, privileges, franchises and property of every description belonging to said South Park Railroad Company, and for and during the entire term of the corporate existence of the South Park Railroad Company. That the defendant duly accepted said leases and thereupon entered into possession of the demised railroads and property.

XVI.

That on or about the 25th day of February, 1890, the Rochester City & Brighton Railroad Company, last above mentioned, duly executed and delivered to the defendant, a lease, under the corporate seal of said Company, of all its property, franchises, rights and privileges, of every kind and description, for the unexpired term of its charter, pursuant to the provisions of the statutes of the State of New York in such case made and provided. Such lease was duly executed under the corporate seal of both companies and duly submitted to the stockholders of each of said companies at a meeting thereof called separately for the purpose of taking the same into consideration, and notice as required by statute of the time and place of holding said meeting and the object thereof, was duly given to the stockholders of each of said companies by a written or printed notice in the manner and form as by the statutes provided. That
71 at said meetings of said stockholders, duly held, the said lease was duly submitted, ratified and approved by the votes of more than two-thirds of the stockholders of each company that proportion being present at each meeting in person or by proxy. That the defendant duly accepted said lease and thereupon entered into the possession of the demised railroad and property.

XVII.

That thereafter and in the year 1890, the defendant, being the lessee of the Rochester City & Brighton Railroad Company, duly acquired, pursuant to the statutes of the State of New York in such case made and provided, the entire capital stock of the Rochester City & Brighton Railroad Company, which said capital stock was duly surrendered and transferred to the defendant and a certificate of such surrender and transfer was duly filed in the office of the Secretary of State of New York, under the common seal of the defendant, to whom such surrender or transfer had been made.

XVIII.

That thereafter in the year 1890, the defendant applied to the Board of Railroad Commissioners of the State of New York for permission to change the motive power of the railroad so acquired by it, and of such extensions thereof, as were contemplated and as were embraced in its articles of association and in said Act of 1869, from horse power to electricity. That such proceedings were thereupon had, that in said year the Board of Railroad Commissioners of the State of New York, duly granted such permission to this defendant, and the property owners in the several streets in which such change was to be made, duly gave their consent to such change.

XIX.

That immediately thereafter, beginning in the year 1890, the defendant, at great expense, proceeded to and did reconstruct
72 the entire railroad which it had acquired from the Rochester City & Brighton Railroad Company, and equipped the same with electrical appliances. That in making such change of motive power to electricity, as aforesaid, it became and was necessary for the defendant to, and the defendant did, reconstruct in its entirety, the road so acquired by it, as aforesaid, including the replacing of the ties, rails and foundation with new material and in replacing all of the cars with new motor power. That previous thereto the cars of said company running on said railroad were operated by horse power.

XX.

That the defendant in acquiring the capital stock of the Rochester City & Brighton Railroad Company and in the conversion of said railroad from a horse railroad to an electrical railroad, and in the reconstruction and re-equipment thereof, had, prior to the commencement of this action, expended upwards of four millions of dollars, and that such expenditure was made by the defendant in reliance upon the provisions of said Act of 1869, and in reliance upon said contract, marked "B," annexed to the answer, with the said City of Rochester, and the resolutions therein embraced.

XXI.

That since the making of the said contract of February 25th, 1890, and up to the time of the lease to the defendant, the said Rochester City & Brighton Railroad Company duly complied with and performed all the conditions of said contract by it to be performed, and that since the making of said lease this defendant has duly complied with and performed all the conditions and obligations of said concontract, on its part to be performed, but it never, prior to March 16th, 1897, constructed or paid for any portions of a new pavement
in any street, or streets, through which it maintained and
73 operated its railroad, and the question as to whether it was bound so to do under existing laws, ordinances and contracts, is to be determined as a question of law herein.

XXII.

That after the passage of the Act of 1869 and up to the time of the making of said lease to the defendant, the Rochester City & Brighton Railroad Company kept in repair that portion of the pavement in the streets in which its tracks were laid prior to May 6th, 1884, and in those streets in which it extended its tracks after the 6th day of May, 1884, it kept the same space in repair, and, after the ordinance of 1887, in addition, that portion of the pavement for two feet outside the rails of its tracks. That since the making of said lease to the defendant it has kept in repair the portion of the street in which the tracks of the Rochester City & Brighton Railroad Company were laid prior to May 6th, 1884, and in those streets in which the Rochester City & Brighton Railroad Company, or the defendant, extended its railroad after the 6th day of May, 1884, has kept in repair that portion of the streets and also for two feet outside of its tracks.

XXIII.

That since the passage of the Act of 1869 and up to March 16th, 1897, neither Rochester City & Brighton Railroad Company or the defendant, has ever been assessed for or required to pay any portion of the expense of a new or permanent improvement of any portion of any street, avenue or highway in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed its road prior to the 6th day of May, 1884.

XXIV.

That since the passage of Chapter 252 of the Laws of 1884, on the 6th day of May, 1884, the Rochester City & Brighton Railroad Company obtained from the municipal authorities of the
74 City of Rochester various consents to extend its tracks and railroad into various streets of the City of Rochester, and the municipal authorities of the City of Rochester have from time to time granted such consents upon the condition provided for in Chapter 252 of the Laws of 1884, as follows: "Upon the express condition that the provisions of Chapter 252 of the Laws of 1884 pertinent thereto shall be complied with," and since the lease to the defendant of the property and franchises of the Rochester City & Brighton Railroad Company, and the filing of the certificate of the acquisition of all of its capital stock, the defendant has applied to the municipal authorities of the City of Rochester for consent to extend its railroad into various streets in the City of Rochester, named in its articles of association or in certificates of extension filed by it, and the municipal authorities have granted such right or franchise to make such extension since the passage of the General Railroad Act, known as the Railroad Law, and such consents have had annexed the condition required by the provisions of the General Railroad Act, as follows: "That the foregoing consent is given upon the following conditions expressly, to wit: that the provisions of Article IV. of the Railroad Law pertinent thereto

shall be complied with. That this consent shall be filed in the office of the clerk of the County of Monroe." And both the Rochester City & Brighton Railroad Company and the defendant acted upon such consents and made and built the extensions into such various streets under such consents.

XXV.

That on the 11th day of December, 1894, the defendant presented to the Common Council of the City of Rochester a petition reading as follows:

"*To the Honorable the Common Council of the City of Rochester.*

GENTLEMEN: The location of the tracks of the Rochester City & Brighton Railroad Company, the Cross Town Street Railway
75 Company, the South Park Street Railway Company and the Rochester Railway Company have, from time to time, been determined upon by the Common Council and the Executive Board since the year 1867. These locations have not, in many cases, been fixed with due and proper formality. In some cases the company, formerly owning and operating the street railroad, put its tracks on the side of the street, or in the center, as the property owners desired, without obtaining the consent, by resolution, of either the Common Council or the Executive Board. In some cases the right was granted to the company to construct a single track through a given street or avenue, and subsequently, with the consent of the owners of the abutting property, a double track has been laid and maintained, without such laying or maintenance being formally ratified or approved by your honorable body. A resolution was passed by the Common Council, granting the right to double track the street railroad on any street where a single track existed at the time of the passage of the resolution, providing the consent of the majority of the owners of the abutting property be obtained. Where a double track has been laid, under such circumstances, and the question of its right to maintain a double track is raised it is a tedious and expensive process to show that it has such right, and where the track has been laid between the curb and sidewalk, it is often difficult, as well as expensive, to prove all the facts necessary to show the right of the company to maintain and operate upon its track in the location in question. As the Rochester Railway Company, the successor of the companies before named, has substantially completed its system and is operating all of its cars with electric motive power, with the single trolley electric system, it seems right and proper that a formal resolution should be passed by your honorable body ratifying and approving of the location of its tracks, poles, wires and appurtenances as at present located and constructed. If it be
76 claimed that the location should be changed in any street or avenue, it would seem fair that such claim be made now.

The Rochester Railway Company, therefore, makes application for the consent of the local authorities of the City of Rochester to the location, construction, operation and maintenance of its railroad, tracks, poles, wires and other appliances, necessary for the operation

of such road in, through, along and upon the streets, avenues and public places hereinafter described, with the crossovers, side tracks, turnouts, etc., as hereinafter set forth. The location of such tracks, poles, wires and appurtenances to be as at present laid out, located and constructed, as follows:

(Then follows a description of the location of the tracks, poles and wires in each street in the City of Rochester in which the Rochester City & Brighton Railroad Company had constructed and maintained a track or tracks, and in which the defendant had maintained or constructed a track or tracks, and which description included the two streets, North St. Paul Street and Park Avenue, which are referred to in the complaint in this action, and also some of the streets for which franchises had been granted to the South Park Railroad and the Cross Town Railroad Company.)

The Rochester Railway Company also makes application for the consent of the local authorities of the City of Rochester for the erection and maintenance of insulated feed wire sufficient to supply its trolley wires with the current required in the economical operation of its road.

Respectfully submitted,

ROCHESTER RAILWAY COMPANY,
J. N. BECKLEY, *President.*"

The Common Council of the City of Rochester thereafter and on the 31st day of December, 1894, duly passed an ordinance
77 contained in the contract which is hereinafter set forth in full in the Finding of Fact, excepting the description of the streets, avenues and public places, which was made part of the ordinance, and a part of and contained in the contract hereinafter set forth.

That on the same day the Common Council adopted a resolution to the effect that the City Attorney draft a clause and it be inserted in and as a part of the foregoing resolutions, indemnifying and saving harmless the city from any loss it may suffer by reason of the location of any of the guard wires or other appurtenances of the said railroad company or by reason of the negligence of the same.

And further that the City Attorney be instructed to prepare a contract with the Rochester Railway Company in accordance with the terms of the foregoing resolutions, and that the Mayor be and he hereby is authorized and directed to execute the same on behalf of the City of Rochester.

That thereafter and on the 31st day of December, 1894, the defendant and the plaintiff entered into an agreement which embodied in full said resolutions, excepting a description of the location of the tracks in the streets, as set forth in the petition, a copy of which agreement is as follows:

"Agreement, made and entered into at Rochester, New York, on the thirty-first day of December, eighteen hundred and ninety-four, by and between the City of Rochester, a municipal corporation, and the Rochester Railway Company, a railroad corporation, witnesseth as follows:

The Rochester Railway Company by John N. Beckley, its President, hereby agrees to and with the City of Rochester, to accept, and in each and every thing and particular, well and truly comply with each and all of the provisions and conditions contained and
78 made in the following and accompanying resolutions as adopted by the Common Council of said city on the thirty-first day of December, 1894, and with all ordinances and resolutions of said Common Council; said Company, for itself, its successors, and assigns, further agrees at all times fully to indemnify and save harmless said city in the ratification and confirmation of the railroad and tracks of said company, and the adoption of the resolutions herein referred to, and also to indemnify and save harmless said city and its departments, of and from, any and all suits, actions and proceedings, as provided in the agreement made between said city and said company, dated February 25, 1890.

And the City of Rochester, by Merton E. Lewis, its acting Mayor, does hereby ratify and confirm the location of the railroad and tracks of said railroad company as set forth in the following or accompanying resolutions in accordance with the conditions therein expressed.

Said resolutions are hereby made a part of this agreement.

In witness whereof, the said, the City of Rochester has hereunto caused its corporate seal to be affixed and these presents to be signed by Merton E. Lewis, its acting Mayor, and said Rochester Railway Company has hereunto caused its corporate seal to be affixed and these presents to be signed by John N. Beckley, its President, at the City of Rochester, on the day and year first above written.

THE CITY OF ROCHESTER,
[L. S.] By MERTON E. LEWIS, *Acting Mayor.*
ROCHESTER RAILWAY COMPANY,
[L. S.] By J. N. BECKLEY, *President.*"

79 "STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this thirty-first day of December, 1894, before me, the subscriber, personally appeared John N. Beckley, to me personally known and known to me to be the President of the Rochester Railway Company, who, being by me duly sworn, did depose and say: That he is the President of the Rochester Railway Company; that he knows the corporate seal of said Rochester Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said Rochester Railway Company, and that such instrument was signed and sealed by him on behalf of said Rochester Railway Company, by authority of its Board of Directors. And the said John N. Beckley, as such President, duly asknowledged such instrument to be the free act and deed of said Rochester Railway Company.

M. G. GRAY,
Com'r of Deeds."

"STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this thirty-first day of December, 1894, before me, the subscriber, personally appeared Merton E. Lewis, to me personally known and known to me to be the acting Mayor of Rochester, who being by me duly sworn, did depose and say: That he is the acting Mayor of the City of Rochester; that he resides in said city; that he knows the corporate seal of said city; that the seal affixed to the foregoing instrument is the corporate seal of said city; that said instrument was signed and sealed by him as acting Mayor, on behalf of said city, by authority of the Common Council of said city, and that the said instrument was executed by the Rochester Railway Company and the acknowledgment of its President was taken
80 before the execution of said instrument by the City of Rochester. And the said Merton E. Lewis, as acting Mayor of said city, duly acknowledged said instrument to be the free act and deed of the City of Rochester.

M. G. GRAY,
Com'r of Deeds."

"By Ald. GREEN:

"Whereas, The Rochester Railway Company has duly applied in writing to the local authorities of the City of Rochester for a ratification and confirmation of the location of its railroad and tracks as operated and used through and along the streets, avenues and highways hereinafter named, and,

"Whereas, The Common Council upon the presentation of said written application, duly fixed the time for, and the place where the said application should be first considered, to wit: before the railroad committee of the Common Council, at the Common Council chamber, in the City Hall building, on the 31st day of December, 1894, at three o'clock p. m., and directed notice thereof to be published according to law; and,

"Whereas, The notice required by law, and the time when, and the place where said application would be first considered as aforesaid, was duly published in two daily newspapers of the City of Rochester, designated by the Mayor; and,

"Whereas, All persons appearing, in pursuance of said notice, were duly heard, and thereupon said railroad committee made a report to the Common Council at a meeting thereof, duly held at the Common Council chamber in the City Hall building, on the 31st day of December, 1894, at four o'clock p. m., recommending the adoption of the following resolutions; and,

"Whereas, Due consideration of the allegations presented having been heard, and due consideration having been had upon said application, it is
81 "Resolved, That the location of the railroad and tracks of said Rochester Railway Company as now operated and used by said company in the streets, avenues and highways hereinafter specifically described, is hereby ratified and approved, subject to such changes and alterations as the Common Council may from time to

time direct, and subject to all the rights and privileges now possessed by the city under existing contracts or agreements or by law, nevertheless upon the following conditions:

"First—That the provisions of Article Four of the Railway Law of the State of New York, being an Act in relation to railroads, constituting Chapter 39 of the General Laws of the State of New York, be complied with.

"Second—In order to increase the efficiency of the police system of said city, and that peace and good order may at all times be maintained in said city, and upon the cars of said company, and that the movement of the cars of said company be not interfered with by riotous or unlawful proceedings, that the said company, its successors and assigns furnish transportation without other consideration than the execution of an agreement on the part of said city embodying the terms of these resolutions, to not more than two policemen at a time upon each of the cars of said company, such transportation to be furnished only when said policemen are in full uniform and such transportation to continue as long as the Rochester Railway Company, its successors and assigns, shall operate, maintain and use its railroad in said city.

"It is further provided that on the written request of the superintendent of police, the said railroad company shall issue to the active detectives of the police force, to the number of not more than nine, tickets for not more than one hundred rides for each detective on the cars of the company in any one month.

82 "Third—In order that opportunity may at all times be afforded to the members of the paid fire department of said city to reach quickly the locality of any conflagration, that said company shall furnish like transportation for the same consideration hereinbefore expressed to not more than two firemen at a time upon each of the cars of said company, such transportation to be furnished only while said firemen are in full uniform and said transportation to continue as long as the Rochester Railway Company, its successors and assigns, shall operate, maintain and use its railroad in said city."

"Fourth—That all of the provisions of any agreement between the City of Rochester and any street railroad company, and all ordinances, resolutions, grants and consents heretofore passed by said city, with reference to the construction, maintenance or operation of street railroads within said city shall remain in full and binding force; and these resolutions shall not be construed as extending or affecting the franchise of any such company, or the time of the expiration of any such franchise, or the moneys required to be paid to said city by such company, or as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company."

"Fifth—That this ratification and confirmation of the location of the railroad and tracks of said company shall have the same effect as if said railroad and tracks had originally been laid with the proper consent and authority of said city, and no other effect or construction."

"Sixth—Said Rochester Railway Company, however, for the same consideration, agrees for itself, its successors and assigns, upon the written order of the Mayor, superintendent or chief of police, or fire commissioner of said city, or officers performing their duties,
83 in cases of emergencies, to transport upon each of its cars any number of policemen or firemen."

"It is further resolved that the streets, avenues, and highways in, through, along, and upon which the Rochester Railway Company may operate its railroad under this ratification and confirmation are as follows:" (Here follows description of streets, avenues and public places, and the location of tracks, as set out in the petition of Rochester Railway Company.)

XXVI.

That thereafter and beginning March 16th, 1897, and thereafter from time to time up to and after the decision of the Court of Appeals of the State of New York, in *Conway vs. The City of Rochester,* decided on the 18th day of October, 1898, the plaintiff claimed that the defendant was liable to pay for all paving when a street was improved with a new pavement between its tracks, the rails of its tracks and two feet outside, and the defendant claimed that it was not liable to pay for such paving in any street or streets where it or its predecessor, the Rochester City & Brighton Railway Company had obtained a franchise or constructed its railroad prior to the taking effect of the Railroad Law passed by the Legislature of the State of New York in the year 1890. And in the year 1899, the plaintiff commenced actions in the Supreme Court of the State of New York against the defendant to recover the expense of paving between the tracks, the rails of the track and two feet outside, in a large number of streets in which the defendant was operating its street railroad, in some of which the franchise had been obtained and the railroad constructed by the Rochester City & Brighton Railroad Company prior to the 6th day of May, 1884, and in some cases where the franchise had been obtained and the railroad constructed between the 6th day of May, 1884, and the first day of May, 1891, and in some of which the franchise had been obtained and the
84 road constructed after the first day of May, 1891. That the defendant interposed defenses to such actions and the same were, at the time of the making of the contract hereinafter referred to, pending undetermined.

That thereafter and in the year 1899, and the year 1901, the Legislature of the State of New York passed a large number of special acts authorizing the municipal authorities of the City of Rochester to assess upon the property of the defendant in the same manner that assessments were made upon the property of other persons for public improvements, the expense of paving between the tracks, the rails of the tracks and two feet outside, in different streets which had been paved by the City of Rochester, after the month of October, 1893, in which streets the defendant owned and operated its street surface railroad and in some of which streets the Rochester City & Brighton Railroad Company had obtained its

franchise and constructed its road prior to the 6th day of May, 1884, and in some of which streets said Rochester City & Brighton Railroad Company had obtained its franchise and constructed its railroad after the 6th day of May, 1884, and before the first day of May, 1891, and in some of which streets the defendant had obtained its franchise and constructed its road after first day of May, 1891.

That under and pursuant to such special acts, assessments were made against the property of the defendant in each of said streets for the expense of paving the space aforesaid, in the street in which such pavement was made, and the defendant commenced an action against the plaintiff in the Circuit Court of the United States for the then Northern District of New York, for the purpose of vacating and setting aside all of such assessments upon the ground that the acts of the Legislature of the State of New York, under which such assessments were made, were and each of them was void
85 and in controversion of the provisions of the Constitution of the State of New York and of the Constitution of the United States.

XXVII.

That while all of such actions were pending undetermined, the Legislature of the State of New York on the 26th day of April, 1901, passed Chapter 562 of the Laws of that year, entitled "An Act to authorize and empower the City of Rochester to enter into a contract with the Rochester Railway Company adjusting and settling all differences between the city and said railway company as to the amount due and owing from the company to the city for certain pavements heretofore made by the city, pursuant to Section 98 of the Railroad Law and providing for the payment of the same." That such act authorized the plaintiff and defendant to enter into a contract for the settlement of all such claims, and which act is hereby referred to with the same force and effect as if the text thereof were herein set forth at large.

That thereafter and on the 27th day of April, 1901, plaintiff and the defendant entered into an agreement dated that day, duly executed and acknowledged by the plaintiff, by George A. Carnahan, its Mayor, and executed and acknowledged by the defendant, by its President, and attested by its Secretary, under the corporate seal and approved by the corporation counsel of the plaintiff, which contract is as follows:

"This agreement, made this 27th day of April, in the year nineteen hundred and one, between Rochester Railway Company, a street railroad corporation duly incorporated under the laws of the State of New York, and having its principal office in the City of Rochester, New York, and hereinafter called 'the railway company,' party of the first part, and the City of Rochester, a municipal corporation of the State of New York, hereinafter called 'the city,' party of the second part, witnesseth:

86 Whereas, The city claims that the railway company is indebted to it in approximately the sum of three hundred and

eighty-six thousand dollars ($386,000), being for pavements made between the tracks, the rails of the tracks and two feet outside the tracks of the railway company, laid and operated in certain streets in the city, which pavements have been made and paid for by city in the past, and the city claims that in the future the railway company is required by Section 98 of the Railroad Law to make such pavements in all streets in which the railway company is operating its said railway; and

Whereas, The city has brought action in the Supreme Court of the State of New York to collect from the railway company a portion of said alleged indebtedness, which action is now pending undetermined; and

Whereas, In the year 1899, the city procured to be passed by the Legislature of the State of New York certain legislation authorizing the Common Council of the city to assess upon the property of the railway Company in certain streets the amount of the cost and expense of making the pavements aforesaid in certain streets, and there is pending in the United States Circuit Court an action brought by the railway company against the city to set aside such assessment under such legislation, on the ground that the same is in violation of the provisions of the Federal Constitution; and

Whereas, The Legislature of the State of New York has passed, and the Governor of the state has approved, in the year 1901, further legislation of the same kind, authorizing the Common Council to assess upon the tracks of the railway company in certain streets the amount of the cost and expense of making such pavements aforesaid; and

Whereas, The railway company claims that it is not liable to bear or pay any part of the expense of any pavements made between its tracks, the rails of its tracks and two feet outside in any
87 street in the City of Rochester in which its predecessor, the Rochester City & Brighton Railroad Company acquired a franchise or constructed a railroad prior to the 7th day of May, 1884, and also claims that it is not liable to pay for pavements made in any street in which its predecessor, the Rochester City & Brighton Railroad Company, acquired a franchise or constructed a railroad prior to the taking effect of the General Railroad Act of 1890; and

Whereas, It is desirable, in the interests of the public, that such controversy between the railway company and the city should be adjusted and settled;

Now, therefore, In consideration of the mutual covenants and agreements upon the part of the several parties hereto, and subject to the authorization of this agreement by the Legislature of the State of New York at its session for 1901,—this agreement not to be effective unless so authorized and legalized, it is hereby agreed as follows: In full satisfaction and discharge of the claim or claims for paving now held by the city against the railway company, amounting with interest to May 15th, 1901, to the sum of three hundred eighty-six thousand, six hundred and thirty-two dollars and forty-six cents ($386,632.46,) the railway company agrees to pay to the city on or

before the first day of June, 1901, the sum of one hundred and forty-six thousand, six hundred and thirty-two dollars and forty-six cents ($146,632.46,) and agrees to pay the remainder, to wit: the sum of two hundred forty thousand dollars ($240,000,) in fifteen equal annual installments of sixteen thousand dollars ($16,000) each,—the first payment to be made on the first day of July, 1902, and the first ten annual installments to be paid without interest, the last remaining five installments to bear interest at the rate of three and a half per cent. per annum from July 1st, 1911, upon the amount of principal remaining unpaid on July 1st, 1911,—and such remaining five installments to be payable with annual interest at the
88 rate aforesaid on all sums remaining unpaid at the time of each payment of an installment. And the city agrees to accept and receive said moneys so to be paid as aforesaid in full satisfaction and discharge of all claims now held and owned, or claimed to be held and owned, by it against the said railway company, for paving any streets in which the tracks of the railway company are situate, and which are referred to in the Ten Acts of the Legislature passed in 1899, and the twenty-one acts of the Legislature passed in the year 1901.

Second—The railway company will, and hereby does, waive any claim which it now makes to exemption from paying for pavements between the tracks, the rails of the tracks and two feet outside, in any streets which shall be hereafter paved, in which streets either the Rochester City & Brighton Railroad Company or the railway company obtained its franchise and constructed its tracks after the 7th day of May, 1884, and will promptly pay its proportion of the cost and expense of such pavements in accordance with the provisions of Section 98 of the Railroad Law, or as hereinafter provided.

Third—That as to all claims which may hereafter be made by the city against the railway company, for all pavements hereafter made in streets or parts of streets in the said city, in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, the question of the liability of the railway company to pay for making pavements in such streets, or parts of streets, between its tracks, the rails of its tracks and two feet outside, or any part thereof, shall be litigated and determined in a court having jurisdiction,—such questions to be raised as speedily as possible, in such manner as may be agreed upon by the corporation counsel of the city and the counsel of the railway company, and such questions to be finally judicially determined in the Courts.

89 It being expressly agreed and understood between the parties hereto that the question of the liability of the railway company to pay for paving hereafter made in any such streets or parts of streets in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, is not conceded by the railroad company, or waived by the city, but shall be judicially determined as aforesaid.

Fourth—It is further expressly agreed and understood by and

between the parties hereto that as to the liability of the railway company to pay for pavements which shall be hereafter made, in any streets in the City of Rochester, this agreement shall be expressly subject to any appeal, amendment or modification of the General Railroad Law of the State of New York imposing upon street railway companies the duty to make pavements between their tracks, the rails of their tracks and for two feet outside of their tracks, as now provided by Section 98 of the Railroad Law; and any such repeal shall inure to the benefit of the railway company the same as if this agreement had not been made, and any amendment or modification of such law shall inure to the benefit of the railway company or of the city, as the case may be, with the same force and effect as if this agreement had not been made.

Fifth—And the railway company hereby agrees that it will not oppose any legislation which the city may endeavor to secure, which legislation shall provide that in all streets hereafter to be improved by a new pavement from curb to curb, in which the railway company has laid its tracks and is operating its railroad, and so long as the General Railroad Law or any general statute requires street railways to pay for any part of a new pavement in streets in which their tracks are laid, the city may in the first instance provide by ordinance in the manner prescribed in the city's charter for the pavement of the whole street, without serving any notice upon
90 the railway company as now provided by Section 98 of the Railroad Law, and which legislation shall provide the manner in which the amount of the expense of such pavement to be borne by the railway company shall be determined, and providing for notice to the railway company of a hearing upon such question and the determination of the same, and providing that after the amount shall be so finally determined, in case the railway company shall not forthwith pay the same to the city, the city may cause the same to be levied and assessed upon the property of the railway company in such street, with interest from the time the said sum becomes due, and providing that such assessment shall be and become an assessment of the City of Rochester for a local improvement, and shall have the same force and effect as any assessment for a local improvement made pursuant to an ordinance of the Common Council of the City of Rochester, and shall be laid, spread and collected in the same manner as such local assessments are laid, spread and collected, in accordance with the Provisions of the Charter of the City of Rochester relating thereto, and providing that the Common Council, the assessors, the Treasurer and all officers and Boards of the city proceed to lay, spread, levy and collect the said sums so assessed in the manner provided by the Charter of the City of Rochester for the laying, spreading, levying and collecting of an assessment for a local improvement, and authorizing the City of Rochester to pursue all remedies for the collection of the sums so assessed that it is authorized to pursue by its Charter for the collection of an assessment for a local improvement made pursuant to an ordinance of the Common Council.

And the railway company agrees that until the final adjournment of the Legislature of 1902, the city may proceed and improve, by a

new pavement, such streets as it shall determine to improve from curb to curb, as hereinbefore provided, without giving to the railway company the notice prescribed by Section 98 of the Rail-
91 road Act, the giving of which notice the railway company hereby waives and expressly agrees to waive. But the railway company shall be entitled to receive a copy of the plans and specifications for such improvement between its tracks, the rails of its tracks and two feet outside, and does not waive its right to contest the amount charged to it by said city for the cost and expense of its share of such pavement.

Provided that such legislation, assessment and waiver of notice shall not apply to any pavements made in any street, or parts of streets, in which the railway company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, until it shall be finally determined as hereinbefore provided, that the railway company is liable to make or pay for such pavements in such streets or parts of streets.

Sixth—That the railway company shall keep in repair all pavements between its tracks, the rails of its tracks and two feet outside in all streets in which it maintains its tracks and operates its railway so long, and only so long as the statutes shall require such repairs.

Seventh—In consideration of the covenants and agreements upon the part of the city, and the performance of each and every of them by the city, the railway company agrees that it will, within three years from the first day of September, 1900, in addition to ordinary expenses of maintenance, expend at least the sum of seven hundred and fifty thousand dollars ($750,000,) in extensions and betterments of its railway construction, property and equipment, in reconstruction of its tracks and equipment, and erection and equipment of a power house, including in such sum the moneys paid by it for new pavements made after the first day of January, 1901, and previous to September 1st, 1903; provided, however, that in case the railway company shall be able to perfect arrangements with any com-
92 pany or individual supplying electrical power, to rent sufficient power to properly operate all its lines, and give as good and sufficient service as could be obtained from the construction of a new power house and plant, then and in that case, the railway company may omit to erect and equip such new power house, and in that case the sum of seven hundred and fifty thousand dollars hereinbefore agreed to be expended in the manner herein stated, shall be reduced to the sum of five hundred thousand dollars ($500,000.)

And the railway company further agrees that it will expend said sum of five hundred thousand dollars for the purposes hereinbefore stated other than the construction of a new power house and plant, within the following terms: a total of one hundred and fifty thousand dollars on or before the first day of January, 1902; on or before the first day of January, 1903; a sum which together with the amount expended up to the first day of January, 1902, shall be equal to three hundred and fifty thousand dollars, and on or before the first day of September, 1903, a sum which with the sums ex-

pended up to the first day of January, 1903, shall equal the sum of five hundred thousand dollars.

The sums hereinbefore agreed to be expended during the times herein stated are in addition to any sums which, under this article, the railway company may expend for a power house and the equipment thereof; and in case the railway company elects to construct and equip such power house, it may do so at any time prior to the first day of September, 1903.

And the railway company hereby expressly agrees that it will keep separate and detailed accounts of such expenditures so to be made by it as aforesaid within the times aforesaid, which detailed accounts shall show the sums of money expended by it for street improvements, extensions, roadway and tracks, overhead con-
93 struction, return wires and bonding, land and buildings, new motors, car-bodies and trucks, machinery and tools, dynamos, engines and boilers, supplies and such other improvements as shall come within the proper definition of "betterments."

And the railway company will permit the city officials, or such proper persons as they may authorize for that purpose, to examine the accounts of and contracts for such expenditures as aforesaid, in order to ascertain that the sum herein stated has been actually and in good faith expended.

And it is further expressly agreed and understood by and between the parties hereto, that in order to secure the city and to give assurance to it that the railway company will perform its agreement to expend the moneys aforesaid for the purposes aforesaid, and in view of the fact that in case of a failure on the part of the railway company to perform upon its part its covenant to make such expenditures aforesaid, that it would be practically impossible to ascertain the damages which would be sustained by the city by reason of the railway company's omission so to perform its said covenant, the damages sustained by the city by reason of such default and omission to perform, shall be and hereby are fixed and liquidated at a sum not exceeding one hundred and forty-six thousand dollars, which sum shall be regarded as fixed and liquidated damages, and not as a penalty.

The amount of such fixed and liquidated damages up to the maximum sum aforesaid to be that part of the sum hereinbefore agreed to be expended by it for the purposes aforesaid which it shall fail to expend within the times specified.

And in order to assure to the city the collection and payment of such fixed and liquidated damages, in case of default upon the part of the railway company, it is agreed that the city may use
94 the one hundred and forty-six thousand dollars to be paid by the railway company under the first clause of this agreement as it may choose, but such sum shall not be deemed to apply upon or be credited to the indebtedness herein conceded by the railway company to be due to said city until after the expiration of the time herein fixed for the expenditures of said money by the railway company in betterments, etc. In case the railway company shall perform its agreement to make such expenditures for betterments, etc., as

herein provided, then said sum of one hundred and forty-six thousand dollars shall be credited to the company as of the date of its payment, and in case the railway company shall fail, as hereinbefore provided, to make such expenditures within the times fixed herein, then, to the extent of its omission to make such expenditures within the times provided, said sum of one hundred and forty-six thousand dollars, or such part thereof as under this agreement represents the fixed and liquidated damages, shall be applied by the city to the payment of such damages, and the remainder, if any, of such sum of one hundred and forty-six thousand dollars shall be credited to the railway company as of the date of its payment.

Eighth—In case the railway company shall at any time fail to make payment of any annual installment, as fixed by the first clause of this agreement,—and such default shall continue for thirty days after such installment becomes due, then, and in that case, the entire amount of two hundred and forty thousand dollars ($240,000,) payable in installments, as provided in the first clause of this agreement, less any installments theretofore paid, with interest at three and a half per cent. upon the amount unpaid from the 15th day of May, 1901, shall at once become due and payable, and the city may take all legal measures to collect the same.

Ninth—That the city and the railway company will co-operate to secure any legislation deemed necessary to carry this agreement into effect.

95 Tenth—It is further expressly agreed and understood by and between the parties hereto that the pending litigation in the Circuit Court of the United States and in the Supreme Court of the State of New York, shall be discontinued without costs to either party as against the other. That the city may proceed under the twenty-one acts passed by the Legislature of 1901, and hereinbefore referred to, to make the assessments in the manner provided in said Acts, but said assessments when made shall not be enforced against the railroad company, or any steps taken for the enforcement thereof, so long as the railway company complies with this agreement and does not make default therein, but said assessments under said Acts and the assessments imposed under the Acts of 1899 and the liens acquired thereunder, shall stand as security for the performance by the railway company of its covenants herein, and for that purpose are conceded to be valid liens, and all claims as to their validity are hereby expressly waived. And all proceedings now authorized by law to be taken to enforce the collection of said liens shall be postponed until such time as the railway company shall make default in its said contract, and may then be taken with the same force and effect as though taken within the time now provided by law.

But it is expressly agreed and understood by and between the parties hereto, that the railway company does not waive its claim that all general statutes heretofore passed, and all general or special statutes hereafter to be passed, requiring the railway company to make pavements between its tracks, the rails of its tracks or two feet outside, or any part thereof, in streets where it obtained its franchise

or constructed a railroad prior to the 7th day of May, 1884, are violative of the Federal and State Constitutions, and expressly reserves the right to raise such questions as to the paving in such streets.

And when the railway company shall have fully performed this agreement upon its part, the city agrees to cancel and discharge of record said assessments and each of them, and vacate the lien created thereby by appropriate entries in the record of said assessments; and further agrees, if necessary, to use all reasonable effort to procure the repeal of said Acts, and each of them, to take any other further proceedings necessary to secure the vacation of said assessments, and each of them, and the release and cancellation of the lien created by said assessments and each of them.

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It is further expressly agreed and understood that nothing herein contained shall be deemed to affect, modify or alter any existing agreement between the Rochester City & Brighton Railroad Company and the City of Rochester, or between the Rochester Railway Company and the City of Rochester.

It is further expressly agreed and understood that these presents and everything herein contained are to bind the successors and assigns of the several parties hereto.

In Witness Whereof, The Rochester Railway Company has caused these presents to be subscribed by its president, attested by its secretary and the corporate seal to be hereunto affixed, and the City of Rochester has caused these presents to be signed by the Mayor of said city, duly authorized to make such subscription by an ordinance of its Common Council and has caused the corporate seal of said city to be hereunto affixed the day and year first above written.

ROCHESTER RAILWAY COMPANY,
[L. S.] By FREDERICK COOK, *President.*

Attest:
GEO. G. MOREHOUSE,
Secretary.

CITY OF ROCHESTER,
[L. S.] By GEO. A. CARNAHAN, *Mayor.*

97 STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 27th day of April, in the year nineteen hundred and one, before me personally appeared Frederick Cook, to me personally known and known to be the President of the Rochester Railway Company, who being by me duly sworn did depose and say: that he is the President of said Rochester Railway Company; that he subscribed the name of said Rochester Railway Company to the foregoing agreement by authority of the Board of Directors of said company; that the seal annexed to said agreement is the corporate seal of said Rochester Railway Company, and he caused the same to be thereunto affixed and attested by the Secretary of said railway company by authority of the Board of Directors of said company.

EDWARD H. GEHRKE,
Notary Public.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 27th day of April, in the year nineteen hundred and one, before me personally appeared George A. Carnahan to me personally known to be the Mayor of the City of Rochester, who being by me duly sworn, did depose and say: that he subscribed the name of the City of Rochester to the foregoing agreement by virtue of an ordinance of the Common Council of the City of Rochester duly passed. That the seal annexed to said agreement is the corporate seal of the City of Rochester and he caused the same to be affixed to said agreement by virtue of an ordinance of the Common Council of said city, and he further says that he is the Mayor of the City of Rochester.

JOHN J. McINERNEY,
Commissioner of Deeds.

98 ROCHESTER, N. Y., *April* 27, 1901.

I hereby certify that the Mayor of the City of Rochester, who has executed the annexed contract on behalf of said city, had authority and power to make such contract, and that such contract is in proper form, under the laws of this State, and the ordinances and resolutions of the Common Council of said city, and is properly executed.

Dated, April 27th, 1901.

P. M. FRENCH,
Corporation Counsel.

XXVIII.

That North St. Paul street is now and was prior to the first day of January, 1872, a public street in the City of Rochester. That in April, 1900, the Common Council of the City of Rochester duly adopted an ordinance in words and terms as follows:

"By Ald. C. S. COOK:

Be it ordained by the Common Council of the City of Rochester: That that portion of St. Paul street from Main street east to the north line of the N. Y. C. & H. R. R. R. bridge between the tracks, the rails of the tracks, and for two feet outside of the outside rails of the tracks of the Rochester Railway Company requires paving and adjusting to grade, and that the said railway company be, and hereby is, required to pave and put in permanent repair that portion of said St. Paul street between the tracks, the rails of the tracks, and for two feet outside the outside rails of the tracks, within thirty days from the date of the serving of this notice, in accordance with the plans and specifications hereto attached, and in case of neglect of said corporation to make such pavement or repairs after the expiration of said period of thirty days, the Commissioner of Pub-
99 lic Works be, and hereby is, directed to make the same at the expense of said railway company, and that the City Clerk be directed to notify the said railway company of the adoption of this ordinance."

That thereafter the notice required by Section 98 of the Railroad Law was given by the City of Rochester to the defendant, requiring it to make such pavement between its tracks, the rails of its tracks, and two feet outside, together with specifications showing the manner in which such pavement was to be made, and the defendant, after the expiration of such thirty days' notice, and after the expiration of a reasonable time thereafter, neglected and refused to make such pavement.

That on the 9th day of October, 1900, the engineer of the City of Rochester duly submitted to the Common Council of said city pursuant to a resolution adopted by said Common Council, requesting the same, an estimate that the cost of constructing the block stone pavement on N. St. Paul street from Main street to Central avenue, included within a space between lines drawn two feet outside of the outside rails of the Rochester Railway Company, would be $18,000, and that the cost of constructing an asphalt pavement on the remainder of said North St. Paul street from Main street east to Central avenue, would be $38,500, and that thereafter and on the 9th day of October, 1900, the Common Council of the City of Rochester duly adopted a first ordinance in words and terms as follows:

"Be it obtained by the Common Council of the City of Rochester that the following improvement is necessary and should be made, viz:

The improvement of St. Paul street, from Main street east to Central avenue, also the square between Franklin street and
100 Central avenue, as follows: (1st). That part thereof included within the space between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with a block stone pavement; also the construction of a concrete foundation under such pavement and tracks, together with the necessary surface sewers in said tracks; (2d). That part thereof lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement. Also the construction of a Medina stone curb six inches thick on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same as at present. The pavement shall extend to the street line at all intersecting street and alleys, except where permanent improvements now exist at proper lines and grades. Also manholes as follows: At each end of the main sewers, at all intermediate places as shall secure a manhole for every 300 feet of sewer. Also street laterals at all intersecting streets not now having sewer connections, of form and sufficiency approved by the Health Officer. Also surface sewers at the corners of all street intersections and at such intermediate places as shall secure a surface sewer for every 250 feet of street length. Also lot laterals to all vacant lots and lots having buildings thereon to which there is now no lateral conveyed, or none of form and sufficiency or in number as approved by the Health Officer. All manholes, surface sewers, street and lot laterals for such improvement to be in number, form and dimensions approved by the Health Officer, or on appeal, by the Commissioner of Public Safety as provided by Section 225 of the City Charter. Also the construction of water services to all vacant lots

and lots having buildings thereon to which there are now no water services, or none complying with the lawful regulations thereof, in number and dimensions conforming to all rules and regulations established under Section 110 of the City Charter. Also cross-
101 walks at all intersecting streets. Also the cleaning and repairing of so much of the main sewer as may be found necessary to restore it to its original condition.

Also the construction of a Portland cement walk or flag stone walk, from curb to street line, on each side of the street, except where cement or flagstone walks of the said width now exist, substantially as good as the new walk, which may be relaid if not conforming to the proper grade or alignment, within the limits mentioned.

The asphalt pavement shall be guaranteed and kept in repair for ten and the stone pavement for five years.

The asphalt surface shall be composed of one of the standard mixtures laid in this city for the past five years, or any other asphalt mixture that has been laid in quantities of at least three thousand square yards, and has worn well for a period of not less than three years.

The pavements and walks of intersecting streets shall be adjusted to the grade of the improvement.

And the City Engineer, under the direction of this Council, having made estimates (1st), of the expense of those portions of the improvement consisting of a block stone pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company; also the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks at $18,000, and (2d), also the paving of that part of said street lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement; also the construction and repair of the necessary lot laterals, water services, curbing and sidewalks within the street lines, at $38,500, and (3d), the aggregate estimated expense of all of said work at $56,500, all of which being deemed reasonable, are hereby approved.

102 And whereas, The Rochester Railway Company has been notified, pursuant to the provisions of Section 98 of Chapter 676 of the Laws of 1892, to pave between its tracks, the rails of its tracks, and for two feet outside of the outside rails of its tracks, and has refused to make such pavement.

It is further ordained, That the whole expense of the work, consisting of a block stone pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks, be charged to, and collected from the Rochester Railway Company; and the expense of the work on the remainder of the improvements as above specified, is hereby directed to be assessed upon all of the following portion of the city, which this Council deems specially benefited by, and proper to be assessed for such improvement, to wit:

One tier of lots and parcels of land on each side of St. Paul street,

from Main street east to Central avenue; also one tier of lots and parcels of land on the east side of the square between Franklin street and Central avenue.

That thereafter a notice was published daily in the two official newspapers printed in the City of Rochester for four days, which notice reads as follows:

"CITY CLERK'S OFFICE,
ROCHESTER, N. Y., *Oct.* 17, 1900.

Notice is hereby given that all persons interested in the subject matter of the following described proposed improvements are requested to attend a meeting of the Common Council of the City of Rochester, appointed to be held October 23, 1900, at 7:30 p. m., in the Common Council Chamber, City Hall Building, when allegations will be heard:

103 St. Paul Street Asphalt Pavement.

The improvement of St. Paul street, from Main street east to Central avenue, also the square between Franklin street and Central avenue, as follows: (1st). That part thereof included within the space between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with a block stone pavement; also the construction of a concrete foundation under such pavement and tracks, together with the necessary surface sewers in said tracks; (2d). That part thereof lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement. Also the construction of a Medina stone curb six inches thick on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same at at present. The pavement shall extend to the street line at all intersecting streets and alleys, except where permanent improvements now exist at proper lines and grades. Also manholes as follows: At each end of the main sewers, at all intersecting sewers and at such intermediate places as shall secure a manhole for every 300 feet of sewer. Also street laterals at all intersecting streets not now having sewer connections, of form and sufficiency approved by the Health Officer. Also surface sewers at the corners of all street intersections and at such intermediate places as shall secure a surface sewer for every 250 feet of street length. Also lot laterals to all vacant lots and lots having buildings thereon to which there is now no lateral conveyed, or none of form and sufficiency or in number as approved by the Health Officer. All manholes, surface sewers, street and lot laterals for such improvement to be in number, form and dimensions approved by the Health Officer, or on appeal, by the Commissioner of Public Safety as provided by Section 225 of the City Charter. Also the construction of
104 water services to all vacant lots and lots having buildings thereon to which there are now no water services, or none complying with the lawful regulations thereof, in number and dimensions conforming to all rules and regulations established under Section 110 of the City Charter. Also crosswalks at all intersecting

streets. Also the cleaning and repairing of so much of the main sewer as may be found necessary to restore it to its original condition.

Also the construction of a Portland cement walk or flag stone walk, from curb to street line, on each side of the street, except where cement or flagstone walks of the said width now exist, substantially as good as the new walk, which may be relaid if not conforming to the proper grade or alignment, within the limits mentioned.

The asphalt pavement shall be guaranteed and kept in repair for ten and the stone pavement for five years.

The asphalt surface shall be composed of one of the standard mixtures laid in this city for the past five years, or any other asphalt mixtu that has been laid in quantities of at least three thousand square ards, and has worn well for a period of not less than three years.

The pavements and walks of intersecting streets shall be adjusted to the grade of the improvement.

The estimated expense is $56,500, of which $18,000 is to be charged to and collected from the Rochester Railway Company, the remainder to be assessed upon the following territory:

One tier of lots and parcels of land on each side of St. Paul street, from Main street east to Central avenue; also one tier of lots and parcels of land on the east side of the square between Franklin street and Central avenue."

105 That thereafter and on the 23d day of October, 1900, the allegations of all persons interested in said improvement who appeared were heard on that day, and the ordinance was laid on the table until the next regular meeting. That thereafter and on the 4th day of December, 1900, at a regular meeting of the Common Council of the City of Rochester, allegations were heard from all persons appearing in relation to the improvement described in said first ordinance, the defendant not appearing at either hearing, and thereupon the following final ordinance was adopted:

"The Common Council of the City of Rochester do ordain and determine that the following improvement is necessary and should be made, to wit:

The improvement of St. Paul street, from Main street east to Central avenue, also the square between Franklin street and Central avenue, as follows: (1st). That part thereof included within the space between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with a block stone pavement; also the construction of a concrete foundation under such pavement and tracks, together with the necessary surface sewers in said tracks; (2d). That part thereof lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement. Also the construction of a Medina stone curb six inches thick on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same as at present. The pavement shall extend to the street line at all intersecting streets and alleys, except where permanent improvements now exist at proper lines and grades. Also manholes as follows: At each end of the main sewers, at all intermediate places as shall secure a manhole for every 300

feet of sewer. Also street laterals at all intersecting streets not now having sewer connections, of form and sufficiency approved
106 by the Health Officer. Also surface sewers at the corners of all street intersections and at such intermediate places as shall secure a surface sewer for every 250 feet of street length. Also lot laterals to all vacant lots and lots having buildings thereon to which there is now no lateral conveyed, or none of form and sufficiency or in number as approved by the Health Officer. All manholes, surface sewers, street and lot laterals for such improvement to be in number, form and dimensions approved by the Health Officer, or on appeal, by the Commissioner of Public Safety as provided by Section 225 of the City Charter. Also the construction of water services to all vacant lots and lots having buildings thereon to which there are now no water services, or none complying with the lawful regulations thereof, in number and dimensions conforming to all rules and regulations established under Section 110 of the City Charter. Also crosswalks at all intersecting streets. Also the cleaning and repairing of so much of the main sewer as may be found necessary to restore it to its original condition.

Also the construction of a Portland cement walk or flag stone walk, from curb to street line, on each side of the street, except where cement or flagstone walks of the said width now exist, substantially as good as the new walk, which may be relaid if not conforming to the proper grade or alignment, within the limits mentioned.

The asphalt pavement shall be guaranteed and kept in repair for ten and the stone pavement for five years.

The asphalt surface shall be composed of one of the standard mixtures laid in this city for the past five years, or any other asphalt mixture that has been laid in quantities of at least three thousand square yards, and has worn well for a period of not less than three years.

The pavements and walks of intersecting streets shall be adjusted to the grade of the improvement.

107 And the City Engineer, under the direction of this Council, having made estimates (1st), of the expense of those portions of the improvement consisting of a block stone pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company; also the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks at $18,000, and (2d), also the paving of that part of said street lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement; also the construction and repair of the necessary lot laterals, water services, curbing and sidewalks within the street lines, at $38,500, and (3d), the aggregate estimated expense of all of said work at $56,500, all of which being deemed reasonable, are hereby approved.

And whereas, The Rochester Railway Company has been notified, pursuant to the provisions of Section 98 of Chapter 676 of the Laws of 1892, to pave between its tracks, the rails of its tracks, and for

two feet outside of the outside rails of its tracks, and has refused to make such pavement.

It is further ordained, That the whole expense of the work, consisting of a block stone pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks, be charged to, and collected from the Rochester Railway Company; and the expense of the work on the remainder of the improvements as above specified, is hereby directed to be assessed upon all of the following portion of the city, which this Council deems specially benefited by, and proper to be assessed for such improvement, to wit:

108 One tier of lots and parcels of land on each side of St. Paul street, from Main street east to Central avenue; also one tier of lots and parcels of land on the east side of the square between Franklin street and Central avenue."

That thereafter the plaintiff did, pursuant to said resolutions and ordinances, make and lay a new pavement in North St. Paul street from Main street to Central avenue, and did adjust the same to grade, and did make such re-pavement between the tracks, the rails of the tracks and two feet outside of the defendant's railroad in such street, and did adjust the same to grade in accordance with, and pursuant to, the specifications served on the defendant; and the plaintiff in making such improvement between the tracks, the rails of the tracks and two feet outside of the defendant's railroad in said streets, necessarily incurred an expense of $13,907.78, of which sum the expense of paving two feet each side of said tracks was $3,413.43; and on the 30th day of September, 1901, paid of such sum the sum of $4,200; and on the 23d day of November, 1901, paid of such sum the sum of $5,250, and on the 21st day of February, 1902, paid of such sum the sum of $4,457.78; that the re-payment of such sum to the plaintiff by the defendant has been demanded from it, and it has neglected and refused to pay the same or any part thereof.

That previous to the 6th day of May, 1884, the Rochester City & Brighton Railroad Company had constructed a street surface railroad in N. St. Paul street, from Main street to a point beyond Central avenue, and operated the same to the time of its lease to the defendant, and that for a long time previous to April 1st, 1900, and since such lease, defendant had operated, and has continuously operated since, and is now operating in said street a street surface railroad for public use in the conveyance of persons and property for compensation.

109 XXIX.

That Park avenue is now, and was prior to the first day of January, 1881, a public street in the City of Rochester. That on the 17th day of July, 1900, the Common Council of the City of Rochester duly adopted an ordinance in words and terms as follows:

"Be it ordained by the Common Council of the City of Rochester: That that portion of Park avenue from Alexander street to Meigs

street between the tracks, the rails of the tracks, and for two feet outside of the outside rails of the tracks of the Rochester Railway Company requires paving and adjusting to grade, and that the said railway company be, and hereby is, required to pave and put in permanent repair that portion of said Park avenue between the tracks, the rails of the tracks, and for two feet outside the outside rails of the tracks, within thirty days from the date of the serving of this notice, in accordance with the plans and specifications hereto attached, and in case of neglect of said corporation to make such pavement or repairs after the expiration of said period of thirty days, the Commissioner of Public Works be, and hereby is, directed to make the same at the expense of said railway company, and that the City Clerk be directed to notify the said railway company of the adoption of this ordinance."

That thereafter the notice required by Section 98 of the Railroad Law was given by the City of Rochester to the defendant, requiring it to make such pavement between the tracks, the rails of its tracks, and two feet outside thereof, together with specifications showing the manner in which such pavement was to be made, and the defendant, after the expiration of a reasonable time thereafter, neglected and refused to make such pavement.

110 That on the 4th day of June, 1901, the engineer of the City of Rochester duly submitted to the Common Council of said city, pursuant to a resolution adopted by said Common Council requesting the same, an estimate that the cost of the Park avenue improvement from Alexander street to Meigs street would be $14,500. That thereafter, and on the 4th day of June, 1901, the Common Council of the City of Rochester duly adopted a first ordinance in words and terms as follows:

"Be it ordained by the Common Council of the City of Rochester as follows:

SEC. 1. It is proposed to improve Park avenue from Alexander street to Meigs street by the construction of a pavement therein. Also the construction of a Medina stone curb, 4 inches thick, on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same as at present.

SEC. 2. Such pavement is proposed to be constructed of brick, unless some other kind of pavement shall be designated pursuant to the provisions of "An Act for the government of cities of the second class," in which case it shall be constructed of the kind of pavement so designated. The pavement and incidental improvements shall be constructed in the manner set forth in an "Ordinance relating to the construction of pavements and incidental improvements in the City of Rochester," adopted by the Common Council on June 4, 1901.

SEC. 3. The whole expense of such improvement, except the expense of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the neces-

sary surface sewers in said tracks; estimated at $9,000, is
111 proposed to be assessed upon all of the following portion and part of the city, which this council deems proper to be assessed for the expense of such improvement, viz:

One tier of lots and parcels of land on each side of Park avenue, from Alexander street to Meigs street; and the expense of the balance of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks, estimated at $5,500, to be charged to and collected from, the Rochester Railway Company."

That thereafter a notice was published daily for four days in the two official daily newspapers printed in the City of Rochester, which notice reads as follows:

CITY CLERK'S OFFICE,
ROCHESTER, N. Y., *June* 12, 1901.

Notice is hereby given that all persons interested in the following described proposed improvements are requested to attend at a meeting of the Common Council appointed to be held June 18, 1901, in the Common Council chamber, City Hall building, at 7:30 p. m., when allegations will be heard:

It is proposed to improve Park avenue from Alexander street to Meigs street by the construction of a pavement therein. Also the construction of a Medina stone curb, 4 inches thick, on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same as at present.

Such pavement is proposed to be constructed of brick, unless some other kind of pavement shall be designated pursuant to the
112 provisions of "An Act for the government of cities of the second class," in which case it shall be constructed of the kind of pavement so designated. The pavement and incidental improvements shall be constructed in the manner set forth in an "Ordinance relating to the construction of pavements and incidental improvements in the City of Rochester," adopted by the Common Council on June 4, 1901.

The whole expense of such improvement, except the expense of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks; estimated at $9,000, is proposed to be assessed upon all of the following portion and part of the city:

One tier of lots and parcels of land on each side of Park avenue, from Alexander street to Meigs street; and the expense of the balance of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks, estimated at $5,500, to be charged to and collected from, the Rochester Railway Company.

T. S. PULVER,
City Clerk."

That thereafter and on the 18th day of June, 1901, at a regular meeting of the Common Council of the City of Rochester, allegations were heard from all persons interested who appeared in relation to the improvement described in said first ordinance, but defendant did not appear, and thereafter the following final ordinance was adopted:

113 Be it ordained by the Common Council of the City of Rochester as follows:

SEC. 1. It is necessary to improve Park avenue from Alexander street to Meigs street by the construction of a pavement therein. Also the construction of a Medina stone curb, 4 inches thick, on each side thereof, connected with all streets, alleys, and driveways. The width between curbs shall be generally the same as at present.

SEC. 2. Such pavement shall be constructed of brick, unless some other kind of pavement shall be designated pursuant to the provisions of "An Act for the government of cities of the second class," in which case it shall be constructed of the kind of pavement so designated. The pavement and incidental improvements shall be constructed in the manner set forth in an "Ordinance relating to the construction of pavements and incidental improvements in the City of Rochester," adopted by the Common Council on June 4, 1901.

SEC. 3. The whole expense of such improvement, except the expense of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks; estimated at $9,000, is proposed to be assessed upon all of the following portion and part of the city:

One tier of lots and parcels of land on each side of Park avenue, from Alexander street to Meigs street; and the expense of the balance of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary

114 surface sewers in said tracks, estimated at $5,500, to be charged to and collected from, the Rochester Railway Company.

SEC. 4. The assessment to be so assessed shall be and become due and payable in ten equal annual installments."

That thereafter the plaintiff did, pursuant to said resolutions and ordinances, make and lay a new pavement in Park avenue from Alexander street to Meigs street, and did adjust the same to grade and did make such re-pavement between the tracks, the rails of the tracks and two feet outside of the defendant's railroad in such street, and did adjust the same to grade in accordance with, and pursuant to, the specifications served on the defendant; and the plaintiff in making such improvement between the tracks, the rails of the tracks and two feet outside thereof of the defendant's railroad in said street, necessarily incurred an expense of $4,356.24; and on the 2d day of December, 1901, paid of such amount the sum of $3,800, and on the 18th day of January, 1902, paid of such amount the sum of $556.24.

That previous to the 6th day of May, 1884, the Rochester City & Brighton Railroad Company had constructed a street surface railroad in Park avenue from Alexander street to a point beyond Meigs street, and continuously operated the same to the time of the lease to defendant, and that for a long time prior to July 1, 1900, and since the date of said lease, defendant had operated, and has continuously operated since, and is now operating in said street between said points a street surface railroad for public use in the conveyance of persons and property for compensation.

That no notice, or notices, other than those set forth in this finding or in finding number "twenty-eight," of the intention to improve either of said streets therein referred to, was given by
115 the authorities of the plaintiff to the defendant.

As conclusions of law, I find:

First—That the defendant is entitled to judgment, dismissing the complaint upon the merits. Let judgment be entered accordingly.

Dated, April 8, 1904.

E. A. NASH,
Justice of the Supreme Court.

Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

To William W. Webb, Attorney for Defendant, City Hall, Rochester, N. Y.:

Take notice, that upon the summons and pleadings in this action and the decision of the court therein, and upon the affidavit, with a copy of which you are herewith served, a motion will be made at the Special term of this court, appointed to be held at the Court House, in the City of Rochester, in and for the County of Monroe, on the 16th day of April, 1904, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order permitting the defendant to tax an additional allowance of costs of five per cent. upon the amount demanded in the complaint,
116 together with the interest thereon, and insert in the judgment herein, together with the taxable costs, the amount of such additional allowance and for such other and further relief in the premises as shall be just.

Yours, etc.,
SATTERLEE, BISSELL,
TAYLOR & FRENCH,
Attorneys for Defendant,
9th Floor German Insurance Bldg., Rochester, N. Y.

Dated, April 13th, 1904.

Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Charles J. Bissell, being duly sworn, says: I am one of the attorneys for the defendant in the above entitled action.

As shown by the findings of fact contained in the decision of the court in this action, this litigation has been before the state courts and the United States circuit Court for a number of years last past. The great and overshadowing question in the case has been from the beginning, whether the act of 1839, for the relief of the Rochester City & Brighton Railroad Company, was a contract between the State of New York and that company, granting upon the terms
117 and conditions therein stated, a franchise for the life of the company and consequently beyond the power of the Legislature to alter or amend, or whether the act was to be regarded as a mere amendment to the charter of that company, or an amendment to the General Railroad Act under which it acquired its charter, and consequently that there was a reserved right in the Legislature to alter, amend or repeal. A previous action was commenced by the City of Rochester at the time Mr. P. M. French was the Corporation Counsel, to recover for paving in a large number of streets, and that action was defended by myself, and Mr. William C. Trull, of New York, a lawyer of great experience and reputation, was employed to assist me. We together drafted the answer in that case, of which the answer in the present case is practically a duplicate. We devoted a great length of time to the study of this question and to an exhaustive examination of the various decisions in the federal courts and in the New York courts, and the courts of the various states in the Union. The same question, complicated with others, arose in the action brought by the Rochester Railway Company *vs.* The City of Rochester, to restrain it from proceeding under the several special acts which are mentioned in the findings herein. In those litigations, which formed the foundation of the present one and in which most of the study given to the question was had, my recollection is that the defendant paid to Mr. Trull for his services, upwards of three thousand dollars.

After the commencement of this action, which was defended by the firm of which I am a member, I spent many days in going over the old briefs, adding to them and in the examination of a number of new questions which had arisen and had been raised. I spent many days in going through the various ordinances passed by the City of Rochester since the year 1862, bearing upon the franchises of the Rochester Railway Company and of its predecessor, the Rochester City & Brighton Railroad Company, and I spent
118 many days in getting together accurately the facts upon which we could agree to submit the case. And after they had

been completed by me and a copy left with the Corporation Counsel for examination, it became necessary to alter and amend them in many ways and to add other facts raising different questions, which the Corporation Counsel deemed necessary to have incorporated in the agreed statement of facts. After many interviews and a great deal of alteration and rewriting of facts, they were finally agreed upon in the form as submitted to the court and I made the various supplemental briefs, which have been submitted to the court, treating the new questions which have been raised by the corporation counsel on the subject of the waiver of the constitutional right, if it existed, and the case was finally submitted to the court for decision and has been decided, but no judgment upon the decision has yet been entered. The case has been an extraordinarily difficult one and has involved most difficult and abstruse questions of constitutional law, involving a very large amount of labor upon my part, although the time occupied in the trial of the case itself, after the briefs had been prepared and the facts agreed upon, was of course trivial. I regard my services, over and above the amount of taxable costs, which cannot exceed seventy-five dollars, as worth upwards of two thousand dollars in the preparation of this case and the work expended in the examination of the various questions that have arisen, without any regard to the value of the services of myself and Mr. Trull in the past. An allowance of five per cent. upon the amount demanded in the complaint would by no means, together with the taxable costs, compensate me for the labor that I have expended upon this case alone.

CHAS. J. BISSELL.

Sworn to before me this 13th day of April, 1904.

CHAS. A. EDGERTON,
Com. of Deeds.

119 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

William A. Sutherland, being duly sworn, deposes and says: That he was Corporation Counsel of the City of Rochester from the first day of January, 1902, up to the first day of January, 1904, and appeared on behalf of the plaintiff in the above entitled action; that the facts in this case were agreed upon by the parties hereto, except as to one finding of fact, as to which testimony was taken; that only one witness was sworn herein, and his testimony was taken pursuant to stipulation before a stenographer, and such testimony submitted to the court; that this case was summed up and submitted to Mr. Justice Nash, and the argument and summing up of both counsel

did not occupy more than one hour; that the counsel for the defendant herein submitted to the court the printed brief in the action brought in the United States Circuit Court by the Rochester Railway Company against the City of Rochester, and also submitted herein an additional typewritten brief.

W. A. SUTHERLAND.

Sworn to before me this 16th day of April, 1904.
CHAS. L. PIERCE,
Com. of Deeds.

120 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Benjamin B. Cunningham, being duly sworn, deposes and says: He is managing clerk in the office of the corporation counsel, and has been since the commencement of this action; that the facts herein were agreed upon between the parties, except as to one fact, as to which evidence was taken; that only one witness was sworn herein, John N. Beckley, whose evidence, pursuant to stipulation, was taken before a stenographer; that deponent appeared upon the examination of said witness, and such examination did not exceed one hour in length. That the action brought in the United States Circuit Court by the Rochester Railway Company against the City of Rochester, referred to in the affidavit of William A. Sutherland, was compromised and settled, and the action was discontinued in the year 1901, and an agreement compromising and settling said action was in said year entered into between said Rochester Railway Company and the City of Rochester.

B. B. CUNNINGHAM.

Sworn to before me this 16th day of April, 1904.
CHAS. L. PIERCE,
Com. of Deeds.

121 At a Special Term of the Supreme Court, held at the Court House in the City of Rochester, N. Y., on the 16th day of April, 1904.
Present: Hon. E. A. Nash, Justice.

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

Upon reading and filing the affidavit of Charles J. Bissell, verified April 13, 1904, and the affidavits of William A. Sutherland and

Benjamin B. Cunningham, verified April 16th, 1904, and the notice of motion on the part of the defendant for extra allowance of costs in this action, after hearing Mr. P. M. French, of counsel for the defendant, in favor of such motion, and Mr. William W. Webb, of counsel for plaintiff, opposed, and it appearing that this is a difficult and extraordinary case where a defense has been interposed and that the sum claimed and the value of the subject involved exceeds the sum of Twenty Thousand Dollars ($20,000) it is hereby

Ordered, that an extra allowance of one thousand dollars ($1,000) in addition to costs, be and the same hereby is, awarded to the defendant herein.

JAMES L. HOTCHKISS, *Clerk.*

122 Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

The issues in the above entitled action having been duly noticed for trial and placed for trial upon the calendar of the trial term of this court, held at the Court House in the City of Rochester, in and for the County of Monroe, in the month of December, 1903, and the action having been duly reached upon the regular call of the calendar and duly moved for trial, and a jury having been waived in open court by the parties and the action tried by the court, and the court having heard the proofs and allegations of the parties and the admissions of fact made by the several parties upon the trial of the action and by written stipulation filed with the court, and the court having duly made and filed its decision in the office of the clerk of the County of Monroe on the 18th day of April, 1904, by which it is found, among other things, as a conclusion of law that the defendant is entitled to judgment dismissing the complaint upon the merits,

Now, on motion of Satterlee, Bissell, Taylor & French, attorneys for the defendant,

Ordered and adjudged, and this court hereby does order and adjudge, that the complaint in this action be and the same hereby is, dismissed upon the merits thereof.

And it is further ordered and adjudged, that the defendant recover of the plaintiff the sum of One Thousand and Ninety-seven Dollars and five cents, for its costs and disbursements, as taxed by the clerk.

JAMES L. HOTCHKISS, *Clerk.*

123 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

The plaintiff in the above entitled action, The City of Rochester, hereby excepts as follows to the findings and decision of the Court, made and filed herein:

First—The plaintiff excepts to that part of the twentieth finding of fact holding that the defendant in acquiring the capital stock of the Rochester City & Brighton Railroad Company, and in the conversion of said railroad from a horse railroad to an electrical railroad, and in the reconstruction and re-equipment thereof, had, prior to the commencement of this action, expended upwards of $4,000,000; and also excepts to that part of said finding holding that such expenditure was made by the defendant in reliance upon the provisions of the act of 1869; and also excepts to that portion of said finding holding that such expenditure was made by the defendants in reliance upon the contract marked B, annexed to the answer, and the resolutions therein embraced; and the plaintiff excepts to the whole of said twentieth finding of fact.

Second—The plaintiff excepts to that part of the first conclusion of law holding that the defendant is entitled to judgment dismissing the complaint upon the merits; and also to that part of said
124 conclusion directing that judgment be entered accordingly, and to the whole of said first conclusion of law.

W. W. WEBB,
Corporation Counsel, Attorney for Plaintiff,
46 City Hall, Rochester, N. Y.

To Satterlee, Bissell, Taylor & French, Attorneys for Defendant, and to the Clerk of the County of Monroe.

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

GENTLEMEN: Please take notice, that the plaintiff in the above entitled action, The City of Rochester, hereby appeals to the Appellate Division of the Supreme Court, Fourth Judicial Department, from the judgment of the Supreme Court entered in the above entitled action in the Monroe County Clerk's office on the 18th day of April, 1904, dismissing the complaint herein upon the merits, with $1,097.05 costs in favor of the defendant and against the plaintiff, and from each and every part and the whole of said judgment; and the plaintiff intends to review upon said appeal an order of the

Supreme Court entered in the office of the Clerk of the County
125 of Monroe on the 18th day of April, 1904, granting an extra allowance of $1,000 to the defendant herein.

Yours, &c.,
W. W. WEBB,
Corporation Counsel, Attorney for Plaintiff,
46 City Hall, Rochester, N. Y.

Dated at Rochester, N. Y., April 19, 1904.

To Satterlee, Bissell, Taylor & French, Attorneys for Defendant, and to the Clerk of the County of Monroe.

Supreme Court.

THE CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

Monroe Trial Term, December, 1903.

William A. Sutherland for plaintiff.
Charles J. Bissell for defendant.

NASH, *J.:*

This action is brought to recover of the defendant the expense of paving between the tracks, the rails of the tracks and two
126 feet outside of the tracks of the defendant's railway, on North St. Paul Street and Park Avenue in the City of Rochester.

In the case of Conway *v.* City of Rochester (157 N. Y., 33), an action brought by a taxpayer to restrain the letting of the contract to pave Lyell Avenue, on the ground that the city authorities had omitted to require the railway company to pave that portion of the street between the tracks, the rails of the tracks and two feet outside, it was held that the provision of Section 98 of the Railroad Law (Laws of 1890, Chap. 565, as amended, Laws of 1892, Chap. 676, Section 98), which requires that every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks and two feet in width outside of its tracks, under the supervision of the proper local authorities, includes repairing with new material, and was in full force and effect as to all of the streets in which the Rochester Railway Company owned and operated a street railway.

The Rochester Street Railway Company was not a party to that action, and upon the facts which now appear claims that as to the streets for the expense of paving of which this action is brought, the statute is inoperative and void, for the reason that it impairs the obligation of certain existing contracts operative as between the city and the railway company.

On or about May 31st, 1862, the Rochester City & Brighton Railroad Company was duly incorporated under and pursuant to the

provisions of the General Railroad Act of 1850 (Laws, Chap. 140). The route described in the Articles of Association of the Rochester City & Brighton Railroad Company is identical with certain of the routes described in the Articles of Association of the defendant.

127 On or about the 24th day of June, 1862, the Common Council of the City of Rochester, in the exercise of the authority conferred upon it by the General Railroad Law of 1850, consented to the construction by the Rochester City & Brighton Railroad Company of a street surface railroad upon the routes designated in its Articles of Association, and one of the conditions of the grant was that the grantee should improve with suitable materials as required by the Common Council of the city, and in a proper manner between its tracks, the rails of its tracks and for two feet four inches outside thereof, and should keep the surface of the street inside the rails and for two feet four inches outside thereof in good repair. Thereafter and on the 8th day of July 1862, said Rochester City & Brighton Railroad Company duly accepted the grant, subject to the provisions and restrictions therein contained.

On or about the 16th day of October, 1862, the Rochester City & Brighton Railroad Company mortgaged its rights, privileges, property and franchises to Hobart F. Atkinson, as trustee. This mortgage was duly foreclosed and at the foreclosure sale the rights, privileges, property and franchises of the Rochester City & Brighton Railroad were purchased by one Chauncey B. Woodworth.

After the acceptance of said franchise from the City of Rochester, and before default in the fulfillment of the conditions of said mortgage, the said Rochester City & Brighton Railroad Company proceeded to and did construct its said railroad in a number of the streets named in the said resolution of the Common Council, and in its Articles of Association, and thereafter it operated its cars thereon, and duly complied with all the provisions of said ordinance.

On or about March 5th, 1868, pursuant to the statutes of the State, Mr. Woodworth duly associated with himself as such purchaser certain persons, and duly incorporated a company by the name of the Rochester City & Brighton Railroad Com-

128 pany, for the purpose of operating the railroad theretofore operated by its predecessor corporation, the Rochester City & Brighton Railroad Company.

By the terms of these last Articles of Association the company was to continue for ninety-nine years.

Immediately after the incorporation of the new corporation known as the Rochester City & Brighton Railroad Company by the purchaser and his associates, the new company petitioned the Common Council, protesting against the onerous condition of the resolution of 1862, above quoted, and setting forth the inability of the new corporation to proceed with the operation of the railroad subject to such conditions, and the fact that the road had never paid, owing to the existence of such conditions. Thereafter and for the space of upwards of a year, the question was debated in the Common Council, committees appointed and various hearings had and proofs offered by the company as to the expense of building, maintaining

and operating the road, and finally the Common Council on the 12th day of January, 1869, duly amended section two of the ordinance of 1862, so as to read as follows: "The track of said railroad shall be laid so as to permit the free passage of vehicles and carriages over the same, and the rails shall be laid even with the surface of the streets and shall conform to the grades thereof as now established, or as they shall from time to time be established, or altered. Said company shall, as soon after the adoption of this ordinance as the condition of the streets through which their track is laid will permit, put the surface of said streets inside the rails and for one foot outside thereof, in good and thorough repair, under the direction of the committee on streets and bridges of the Common Council, and shall thereafter keep said streets in good repair inside its tracks or between the rails of their tracks, only during the term of five years, and whenever it becomes necessary to improve by ordinance or
129 otherwise, any of the streets through which their track is laid, with a new or permanent improvement, said company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of making the same, during the term of five years from the adoption of this ordinance."

Shortly after the adoption of said resolution the Rochester City & Brighton Railroad Company caused to be prepared and submitted to the city authorities a proposed act of the Legislature, legalizing the action of the Common Council, and the same was transmitted to the Common Council by the Mayor of the city, with a written request that the Common Council by resolution approve and direct the clerk to transmit the bill to the Legislature, whereupon the Common Council adopted the following resolution: "Resolved, That the clerk of this board be authorized to transmit a copy of the bill relating to street railroads presented by the Mayor to this board, to the Legislature, requesting said body to legalize the action of the Common Council by the passage of said bill."

On or about the 12th day of February, 1869, said act was passed by the Legislature and duly signed by the Governor, and is entitled, "An Act for the relief of the Rochester City & Brighton Railroad Company," and is known and designated as Chapter 34 of the Laws of 1869.

The provision of the Act of 1869 is as follows:

"SEC. 5. Said company shall put, keep and maintain the surface of the streets inside the rails of its tracks in good and thorough repair, under the direction of the committee on streets and bridges of the Common Council of said City of Rochester; but whenever any of said streets are by ordinance or otherwise permanently im-
130 proved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but shall make its rails in such street or streets conform to the grade thereof."

Thereafter the said Rochester City & Brighton Railroad Company continued to maintain and operate its street surface railroad under the general statutes of the State of New York, and with the consent of the Common Council extended its railroad into many other

streets and parts of streets in the City of Rochester, incurring thereby large expense and expending large sums of money therefor, the exact amount of which does not appear. The company kept in repair the pavement as required, but whenever a street was improved by a new pavement it was not called upon by the authorities of the City of Rochester to make or pay for any part of such improvement. On the 18th of May, 1880, the Common Council of the City of Rochester re-enacted the ordinance of 1862 as amended in 1869.

On the 29th of March, 1887, the Common Council of the City passed an ordinance in relation to street railroads, section two, which ordinance is as follows:

"SECTION 2. The track of said railroad shall be so laid as to permit the free passage of vehicles and carriages over the same, and the rails shall be laid even with the surface of the streets and avenues, and shall conform to the grades thereof, as now established, or as they shall from time to time be established or altered. As soon after the adoption of this ordinance as the condition of the streets and avenues, through or along which any street surface railroad track is now laid will permit, the surface of such streets and avenues inside the rails of all tracks authorized to be laid prior to May 6, 1884, and between the tracks and rails of such tracks and for a space two feet in width outside and adjoining the outside rails of the tracks of any and all extensions or branches of any railroad authorized
131 to be constructed since May 6, 1884, shall be put in good and thorough repair by the company, under the direction of the Executive Board of said city, and thereafter at all times the same shall be in like manner and degree kept and maintained; as to the tracks authorized to be constructed or laid prior to the 6th day of May, 1884, the surface of said streets and avenues inside and between the rails thereof, and roads, and any and all extensions and branches of any roads authorized to be constructed or laid since May 6, 1884, between the tracks and the rails of the tracks, and a space two feet in width outside and adjoining the outside rails of the track or tracks."

On the 21st of January, 1890, the Rochester City & Brighton Railroad Company petitioned the Common Council for permission to change its motive power from horse to the overhead system of electricity, commonly known as the "trolley system." The prayer of the petition was duly granted by resolution of the Common Council in which it was provided, "that the consent and permission of the City of Rochester is hereby granted to the Rochester City & Brighton Railroad Company, its successors and assigns, in addition to the rights, privileges and franchises now possessed by it, to establish, construct, maintain, operate and use the overhead single trolley electric system of motive power, so called, in the operation of its cars, in and on each and all of the streets, avenues and public places in the City of Rochester, in, along, through and upon which said company has constructed and is now maintaining and operating a street surface railroad, and to construct, set, lay, maintain and use the poles, wires, appliances and such electrical appliances and apparatus, and to make the underground and surface alterations to and

on each and all of the said streets, avenues and public places so far as necessary for that purpose; but said company, its successors and assigns, shall not have the right to construct and operate said electric railroad in any street until the requisite consents of property
132 owners on such streets, avenues or places, and the consent of the Board of Railroad Commissioners of the State of New York shall be obtained as required by law."

The material to be used and the manner of construction and maintenance were particularly set forth in the resolutions, and it was further provided that, before the grant and consent should become operative the said company should deliver to and leave with said committee a written agreement with the city to accept and in each and every particular comply with each and all of the provisions contained in the resolutions, and to well and truly, at all times, comply with all ordinances and resolutions of the Common Council of said city not in conflict therewith, which had at any time before or which might at any time thereafter be passed, relating to the rate of speed, etc., and the general repairs of the streets within and for two feet outside of and adjoining said company's track or tracks.

In accordance with and pursuant to said resolutions the Rochester & Brighton Railroad Company on the 25th of February, 1890, made and entered into the proposed contract in writing, by which the company accepted the conditions imposed, and agreed to comply with all the ordinances and resolutions of said Common Council not in conflict with said resolutions, which had at any time before, or which might be at any time thereafter passed, relating to the rate of speed, etc., and the general repairs of the streets within and for two feet outside of and adjoining said company tracks.

On the 25th of February, 1890, the Rochester City & Brighton Railroad Company duly executed, and delivered to the defendant a lease of all its property, franchises, rights and privileges of every kind and description, for the unexpired term of its charter, pursuant to the provisions of the statutes of the State in such case made and provided. The defendant duly accepted said lease and there-
133 upon entered into the possession of the demised railroad and property; thereafter, and in the year 1890, the defendant, being the lessee of the Rochester City & Brighton Company, duly acquired pursuant to the statutes of the State, the entire capital stock of the Rochester City & Brighton Railroad Company.

Thereafter in the year 1890, the defendant applied to the Board of Railroad Commissioners of the State of New York for permission to change the motive power of the railroad so acquired by it, and of such extensions thereof as were contemplated and as were embraced in its Articles of Association and in said Act of 1869, from horse power to electricity. That such proceedings were thereupon had, that in said year the board of Railroad Commissioners of the State of New York duly granted such permission to the defendant, and the property owners in the several streets in which such change was to be made duly gave their consent to such change. Immediately thereafter, beginning in the year 1890, the defendant, at great expense, proceeded to and did reconstruct the entire railroad which it had acquired from the Rochester City & Brighton Railroad Com-

pany, and equipped the same with electrical appliances. That in making such change of motive power to electricity, as aforesaid, it became and was necessary for the defendant to, and the defendant did reconstruct in its entirety the road so acquired by it as aforesaid, including the replacing of the ties, rails and foundation, with new material, and in replacing all of the cars with new motor power. That previous thereto the cars of said company running on said railroad were operated by horse power.

The defendant in acquiring the capital stock of the Rochester City & Brighton Railroad Company and in the conversion of said railroad from a horse railroad to an electrical railroad, and in the re-
construction and re-equipment thereof, had, prior to the com-
134 mencement of this action, expended upwards of four millions of dollars, and that such expenditure was made by the defendant in reliance upon the provisions of said Act of 1869, and in reliance upon said contract of February 25th, 1890.

After the making of the said contract of February 25th, 1890, and up to the time of the lease to the defendant, the said Rochester & Brighton Railroad Company duly complied with and performed all the conditions of the said contracts by it agreed to be performed, and that since the making of said lease the defendant has duly complied with and performed all the conditions and obligations of said contracts on its part to be performed, but it never prior to March 16th, 1897, constructed or paid for any portion of a new pavement in any street or streets through which it maintained and operated its railroad. That since the passage of the Act of 1869 and up to March 16th, 1897, neither the Rochester City & Brighton Railroad Company or the defendant, has ever been assessed for or required to pay any portion of the expense of a new or permanent improvement of any portion of any street, avenue or highway in which the Rochester City & Brighton Railroad Company, obtained its franchise or constructed its road prior to the 6th day of May, 1884. That after the passage of Chap. 252 of the Laws of 1884, the Rochester City & Brighton Railroad Company obtained from the municipal authorities of the City of Rochester various consents to extend its tracks and railroads into various streets of the City of Rochester, and the municipal authorities of the City of Rochester have from time to time granted such consents upon the condition provided for in Chapter 252 of the Laws of 1884, as follows: "Upon the express condition that the provisions of Chapter 252 of the Laws of 1884 pertinent thereto shall be complied with," and since the lease to the defendant of the property and franchises of the Rochester City & Brighton Rail-
road Company and the filing of the certificate of the acqui-
135 sition of all of its capital stock, the defendant has applied to the municipal authorities of the City of Rochester for consent to extend its railroad into various streets of the City of Rochester, named in its Articles of Association or in certificates of extension filed by it, and the municipal authorities have granted such right or franchise to make such extension since the passage of the General Railroad Act, known as the Railroad Law, and such consents have had annexed the condition required by the provisions of the General Railroad Act, as follows: "That the foregoing consent is given

upon the following conditions expressly, to wit: that the provisions of Article IV of the Railroad Law pertinent thereto shall be complied with." And both the Rochester City & Brighton Railroad Company and the defendant acted upon such consents and made and built the extensions into such various streets under such consents.

On the 11th of December, 1894, the defendant presented to the Common Council of the city a petition, stating that the location of the tracks of the Rochester City & Brighton Railroad Company and other railroad companies to the rights of which the defendant had succeeded and the tracks of the railroad of the defendant as laid, had not been fixed with due and proper formality, although resolutions from time to time granting the right had been passed by the Common Council, and the consents of property owners obtained; and that the defendant having substantially completed its system of operating its cars with electric motive power, it seemed right and proper that a formal resolution of the Common Council should be passed ratifying and approving of the location of its tracks, poles, wires and appurtenances, as then at present located and constructed.

The defendant therefore made application for the consent of the authorities of the city, to the location, construction, operation
136 and maintenance of its railroads, in, through, along and upon the streets of the city where it had been constructed, setting forth a description of the location of the tracks, etc., in each of the streets in which the defendant had constructed its tracks, which description included the said two streets, North St. Paul Street and Park Avenue.

Thereupon the Common Council passed an ordinance embodied in certain resolutions containing the conditions upon which the city would grant the prayer of the petition, and directed the City Attorney to prepare a contract in accordance therewith.

The contract was so made and executed by and on behalf of the city and the defendant on the 31st of December, 1894; it provided that the defendant would in each and every particular comply with the conditions contained in the resolutions adopted by the Common Council; and on the part of the city, that it thereby ratified and confirmed the location of the railroad and tracks of the defendant as set forth in the resolutions, in accordance with the conditions therein expressed.

The conditions imposed, including the consideration moving to the city, set forth in the resolutions, were as follows:

"Resolved, That the location of the railroad and tracks of the said Rochester Railway Company as now operated and used by the said company in the streets, avenues and highways hereinafter specifically described, is hereby ratified and approved, subject to such changes and alterations as the Common Council may from time to time direct, and subject to all the rights and privileges now possessed by the city under existing contracts or agreements or by law, nevertheless upon the following conditions:

First—That the provisions of Article Four of the Railway
137 Law of the State of New York, being an act in relation to railroads constituting Chapter 39 of the General Laws of the State of New York be complied with.

Second—In order to increase the efficiency of the police system of said city, and that peace and good order may at all times be maintained in said city, and upon the cars of said company, and that the movement of the cars of said company be not interfered with by riotous or unlawful proceedings, that the said company, its successors and assigns furnish transportation without other consideration than the execution of an agreement on the part of said city, embodying the terms of these resolutions to not more than two policemen at a time upon each of the cars of said company, such transportation to be furnished only when said policemen are in full uniform and such transportation to continue so long as the Rochester Railway Company, its successors and assigns shall operate, maintain and use its railroad in said city.

It is further provided that on the written request of the superintendent of police, the said railroad company shall issue to the active detectives of the police force, to the number of not more than nine, tickets for not more than one hundred rides for each detective on the cars of the company in any one month.

Third—In order that opportunity may at all times be afforded to the members of the paid fire department of said city to reach quickly the locality of any conflagration, that said company shall furnish like transportation for the same consideration hereinbefore expressed to not more than two firemen at a time upon each of the cars of said company, such transportation to be furnished only while said firemen are in full uniform, and said transportation to continue so long as the Rochester Railway Company, its successors and assigns, shall operate, maintain and use its railroad in said city.

138 Fourth—That all the provisions of any agreement between the City of Rochester and any street railroad company, and all ordinances, resolutions, grants and consents heretofore passed by said city, with reference to the construction, maintenance or operation of street railroads within said city shall remain in full and binding force; and these resolutions shall not be construed as extending or affecting the franchise of any such company, or the time of the expiration of any such franchise, or the moneys required to be paid to said city by such company, or as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company.

Fifth—That this ratification and confirmation of the location of the railroad and tracks of said company shall have the same effect as if said railroad and tracks had originally been laid with the proper consent and authority of said city, and no other effect or construction.

Sixth—Said Rochester Railway Company, however, for the same consideration, agrees for itself, its successors and assigns, upon the written order of the mayor, superintendent or chief of police, or fire commmissioner of said city, or officers performing their duties, in cases of emergencies, to transport upon each of its cars any number of policemen or firemen."

Thereafter and beginning March 16th, 1897, and thereafter from time to time up to and after the decision of the Court of Appeals,

in Conway *vs.* the City of Rochester, decided on the 18th day of October, 1898, the plaintiff claimed that the defendant was liable to pay for all paving when a street was improved with a new pavement between its tracks, the rails of its tracks and two feet outside, and the defendant claimed that it was not liable to pay for such paving in any street or streets where it or its predecessor, the Rochester City & Brighton Railroad Company, had ob-
139 tained a franchise or constructed its railroad prior to the taking effect of the Railroad Law, passed by the Legislature of the State of New York in the year 1890; and in the year 1899, the plaintiff commenced actions in the Supreme Court of the State of New York against the defendant to recover the expense of paving between the tracks, the rails of the tracks and two feet outside, in a large number of streets in which the defendant was operating its street railway, in some of which, the franchise had been obtained and the railroad constructed by the Rochester City & Brighton Railroad Company prior to the 6th day of May, 1884, and in some cases where the franchise had been obtained and the railroad constructed between the 6th day of May, 1884, and the first day of May, 1891, and in some of which the franchise had been obtained and the road constructed after the 1st day of May, 1891. The defendant interposed defenses to such actions and the same were, at the time of the making of the contract hereinafter referred to, pending undetermined. That thereafter and in the year 1899, and the year 1901, the Legislature of the State of New York passed a large number of special acts authorizing the municipal authorities of the City of Rochester to assess upon the property of the defendant in the same manner that assessments were made upon the property of other persons for public improvements, the expense of paving between the tracks, the rails of the tracks and two feet outside, in different streets which had been paved by the City of Rochester after the month of October, 1893, in which streets the defendant owned and operated its street surface railroad and in some of which streets the Richester City and Brighton Railroad Company had obtained its franchise and constructed its road prior to the 6th day of May, 1884. That under and pursuant to such special acts assessments were made against the property of the defendant in each of said streets for the expense of paving the space aforesaid, in the street in which such pavement was made, and the defendant
140 commenced an action against the plaintiff in the Circuit Court of the United States for the then Northern District of New York, for the purpose of vacating and setting aside all of such assessments upon the ground that the acts of the Legislature of the State of New York under which such assessments were made, were and each of them was void and in controversion of the provision of the Constitution of the State of New York and of the Constitution of the United States. That while all of such actions were pending undetermined, the Legislature of the State of New York, on the 26th of April, 1901, passed Chap. 562 of the laws of that year, entitled "An Act to authorize and empower the City of Rochester to enter into a contract with the Rochester Railway Company adjusting and

settling all differences between the city and the said railway company as to the amount due and owing from the company to the city for certain pavements heretofore made by the City, pursuant to Section 98 of the Railroad Law and providing for the payment of the same." That such act authorized the plaintiff and the defendant to enter into a contract for the settlement of all such claims.

Thereafter and on the 27th day of April, 1901, plaintiff and the defendant entered into an agreement dated that day, duly executed and acknowledged by the plaintiff, by George A. Carnahan, its Mayor, and executed and acknowledged by the defendant by its President, and attested by its Secretary, under the corporate seal, and approved by the corporation counsel of the plaintiff, which contract recited the matters in difference between the city and the defendant, and in settlement thereof provided that the defendant should pay to the city in full satisfaction and discharge of its claims for paving, the sum of three hundred eighty-six thousand six hundred thirty-two dollars and forty-six cents, and the defendant agreed to waive any claim for exemption from paying for pavements thereafter laid in streets in which it or the Rochester City &
141 Brighton Railroad Company obtained a franchise and constructed tracks after May 7th, 1884, but that, "as to all claims which may hereafter be made by the city against the railway company, for all pavements hereafter made in streets or parts of streets in the said city, in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, the question of the liability of the railway company to pay for making pavements in such streets, or parts of streets, between its tracks, the rails of its tracks and two feet outside, or any part thereof, shall be litigated and determined in a court having jurisdiction, such questions to be raised as speedily as possible, in such manner as may be agreed upon by the corporation counsel of the city and the counsel of the railway company, and such questions to be finally judicially determined in the courts. It being expressly agreed and understood between the parties hereto that the question of the liability of the railway company to pay for paving hereafter made in any such streets or parts of streets in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, is not conceded by the railway company, or waived by the city, but shall be judicially determined finally as aforesaid.

The Court of Appeals in the Conway case did not have before it the several ordinances and agreements constituting the various contracts made by and between the City of Rochester and the Rochester City & Brighton Railroad Company and the Rochester Railway Company. The contention on behalf of the city there was that the provisions of the General Railroad Act of 1890, amended in 1892, only required repairs to be made by railroad companies, and did not include the construction of new pavements, and if new pavements were included the Rochester Railway Company was exempted by a special statute from making or contributing toward the expense

thereof. Although reference was made to the Act of 1869,
142 for the relief of the Rochester City & Brighton Railroad Company in the brief of counsel for the city, no allusion or reference is made to that act in the opinion.

It seems to be well settled law that the ordinance or resolutions of the Common Council of a city consenting to the use of its streets by a railroad corporation when accepted by the corporation, constitute a contract.

In the case of the Brooklyn Central Railroad Company *v.* The Brooklyn City Railroad Company (32 Barbour, 354), it is said, speaking of the resolutions of the Common Council of the City of Brooklyn, granting its assent to the construction of a railroad, "the resolution * * * constituted a contract which the company was bound to perform, and which the Common Council could not rescind without adequate cause." (p. 364.) Again on page 366 of the same case, reference is made to the observations upon the same question by Chancellor Kent, as follows: "Speaking of franchises, Chancellor Kent in his commentaries says, (vol. 3, p. 458), 'they contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the duties and conditions described in the grant. The government cannot resume them at pleasure, or do any act to impair the grant without a breach of the contract."

In Milhau *v.* Sharp (27 N. Y., at page 620), the Court, in considering a resolution of the Common Council of the City of New York, granting authority to contract and operate a railroad, says: "It was not, as has been insisted, an act of legislation, but on the contrary, possesses all the characteristics of, and was in fact, a contract. It was held to be a contract in the case of The People *v.* Sturtevant (9 N. Y., 273), and but a slight examination of its provisions is requisite to show the correctness of that decision. Prior
143 to its acceptance by the defendants, the resolution was only a proposition having no binding force whatever. It was certainly not then a law, and since that time the Common Council have taken no action upon it. Upon its acceptance (if valid) it became a contract between two parties, binding each to the observance of all its provisions. * * * The defendant's counsel insists that the resolution is not a contract, but a license, revocable at the pleasure of the Common Council. This proposition cannot be reconciled with the decision in The People *v.* Sturtevant (*supra*) nor with the principle declared by the Supreme Court of the United States, in the Dartmouth College case (4 Wheat., 519), and other kindred cases in substance, that grants of such franchises, though made by acts in form legislative, become, when accepted and acted upon, contracts, not subject to be recalled or modified, except in accordance with express reservations contained in the grants."

In Skaneateles Water Works Co. *v.* Village of Skaneateles (161 N. Y., 154) the Court had under consideration the effect of certain statutes affecting the rights of the parties, the opinion at page 166, states: "We are thus brought to an examination of the statutes, and our first inquiry will be whether they merely threaten parties in the

plaintiff's situation with the consequences of local municipal competition, or constitute an invasion of their grants. The former, as we have seen, is permissible. But the latter may not be done, but the doctrine has been settled since the Dartmouth College case (4 Wheat., 518), that a grant of corporate powers by the sovereign to an association of individuals for public use, constitutes a contract within the meaning of the Federal Constitution, prohibiting a State Legislature from passing laws impairing its obligations. In the recent case of Pearsall *v.* Great Northern Railroad Company (161 U. S., 646), the Court, after a brief review of the Dartmouth College case, said:

"Subsequent cases have settled the law that wherever charter
144 rights have been acquired by virtue of the corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation." Intermediate the cases cited there are many cases in the Supreme Court of the United States in which the doctrine referred to has been either asserted or made the basis for the decision, as in N. O. Gas Co. *v.* Louisiana Light Co. (115 U. S., 650); N. O. Water Works Co. *v.* Rivers (115 U. S., 674); Louisville Gas Co. *v.* Citizens' Gas Co. (115 U. S., 683); these were cases where the grants were of an exclusive right to supply gas or water to a municipality. That court has taken frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation, and in a series of decisions extending over many years has held that a clause in a contract imposing taxes in lieu of other taxes, or all taxes to which the stockholders would be subject, is impaired by legislation raising the rate of taxation or imposing taxes other than those specified in the charter."

Therefore, it must be held here, that, by the ordinance of January 12th, 1869, relieving the Rochester City & Brighton Railroad Company from making any new pavement, approved by the Act of the Legislature (Laws of 1869, Chap. 34), specifically providing that said railroad company should keep the surface of the streets inside of its tracks in repair, but that whenever any of said streets were permanently improved, said company should not be required to make any part or portion of such improvement, under which ordinance and enactment the railroad company continued to maintain and operate its street surface railroad, and extend its railroad into other streets and parts of streets in the city, a contract was made and entered into by and between the city and the railroad company from the provisions of which neither without the consent of the other was

at liberty to depart, so that from the time of the passage of
145 the amended ordinance in 1869, to the time of the enactment of the Law of 1884 (Laws of that year, Chapter 252), providing for the construction, extension, maintenance and operation of street surface railroads, the Rochester City & Brighton Railroad Company was required to keep and maintain the surface of its streets inside the rails of its tracks in good and thorough repair, but was not required to make or bear the expense of any part or portion of any permanent improvement of the streets in which its tracks had been laid or any extensions thereof, prior to May 6th, 1884, the date of the passage of Chapter 252 of the laws of that year.

The brief counsel for the city states that, the action is brought under the laws of 1884, "which directs that the street railway companies shall, in case of repaving or repairing pavements in the streets of cities, provide at their own expense such repaving or repairs, and in case of neglect the local authorities may themselves perform the work and call upon the railway companies for payment therefor."

That act provides, as stated in the title, for the construction and extension of street surface railroads, and its provisions regulate the manner and the terms and conditions upon which corporations may be formed for the purpose of constructing, maintaining and operating street surface railroads, and for the construction by any existing street surface railroad company of extensions of its lines or branches thereof.

"SECTION 9. Every such corporation incorporated under, or constructing, extending or operating a railroad constructed or extended under the provisions of this act, within the incorporated cities and villages of this state, shall also whenever and as required under the supervision of the proper local authorities have and keep in permanent repair the portion of every street and avenue between its tracks, the rails of its tracks and a space two feet in width out-
146 side and adjoining the outside rails of its track or tracks so long as it shall continue to use such tracks so constructed under the provisions of this act."

This provision applies, as it clearly appears from the context of the section, and also from the various provisions of the other sections of the act, to the tracks of street surface railroad companies incorporated under its provisions and to the tracks only of an extension of the line or branches of the railroad of an existing street surface railroad company. That the act was not intended to regulate the operation of the railroad of an existing street surface railroad company is expressly shown in the section providing for the regulation of fares, as follows:

"SECTION 13. No company or corporation incorporated under, or constructing and operating a railroad under the provisions of this act, shall charge any passenger more than five cents for one continuous ride from any point on its road or any road or branch operated by it or under its control, to any point thereon or on any connecting branch thereof within the limits of any incorporated city or village. This section shall not be construed to apply to any part of any road heretofore constructed and now in operation, unless such company shall acquire the right to extend such road, or to construct branches thereof under the provisions of this act, in which event its rate of fare shall not exceed its authorized rates prior to such extension."

If, however, the provision of the act can be regarded as broad enough to apply the provisions of section nine to the entire railroad of any existing street surface railroad company extending its lines under the provisions of the act, then such provisions are unconstitutional, as being violative of the existing contract between the city and the Rochester City & Brighton Railroad Company, to all the rights of which company the defendant has succeeded. (Gilmore *v.* City of Utica, 121 N. Y., 561.)

147 It is further urged in behalf of the plaintiff that, the defendant has expressly assented to the right of the city to

exact the payment now in suit, and effectually waived any claim that it might have for exemption, by assenting to the terms and conditions upon which the Common Council definitely fixed and confirmed the right of the defendant to the location of its tracks as the same stood in December, 1894, upon condition that Article 4 of the Railroad Law (which is the codification of the statute of 1884) be fully complied with by the defendant.

It may be said that such assent of the city to the location of the defendant's tracks as the same had been laid under approval and consents obtained from time to time, was a mere formality; no new or additional franchise being granted by such ratification and approval, the conditions imposed were violative of the previously existing contracts.

But the resolution of the Common Council that the provisions of Article Four of the Railway Law should be complied with, assented to by the defendant, is modified, and the rights of the parties specifically stated and determined by the subsequent provision that all of the provisions of any agreement between the City of Rochester and any street railroad company and all ordinances, resolutions, grants and consents heretofore passed by said city, with reference to the construction, maintenance or operation of street railroads within said city shall remain in full and binding force; and these resolutions shall not be construed as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company. Moreover further exactions were made by the city in requiring the defendant as long as it or its successors and assigns should operate, maintain and use its railroad in said city, to furnish free transportation on its cars to the police and firemen of the city, for which there
148 was no equivalent except the resolution of the Common Council ratifying and approving the location of the railroad and tracks of the defendant, as the same were then operated and used.

It is argued in behalf of the city that the special acts of the Legislature authorizing the municipal authorities of the city to assess upon the property of the railway company, in the same manner that assessments are made upon the property of other owners benefited by the improvement of the streets, the expense of paving between and outside the railroad tracks, is not violative of the rights of the defendant, as impairing the obligation of its contract with the city. Citing Lake St. R. R. Co. *v.* City of Chicago, 183 Ill., 75; Lincoln St. Ry. Co. *v.* City of Lincoln, 84 N. W. Rep., 802; Sterrie *v.* Houston City St. Ry. Co., L. R. A. 716; N. Y. L. E. & W. R. R. Co. *v.* City of Dunkirk, 65 Hun., 494, affirmed 143 N. Y., 659.

In Lake St. El. R. R. Co. *v.* City of Chicago, there was simply an ordinance granting authority to an elevated railroad company to maintain and operate its road, requiring it to restore and put in good condition pavements, etc., in case they were disturbed in constructing the road. It was held that the ordinance was not a contract which precluded a subsequent assessment of the company's property for the local improvement of the street, the same as any real estate contiguous to the improvement.

In Lincoln St. R. R. Co. *v.* City of Lincoln, chiefly relied upon in support of this contention, the ordinance submitted to the electors the proposition of giving their consent to the contruction and operation of a railway, provided that "said railway track shall be so constructed as to present the least practical obstruction to the ordinary public use of the streets, and that it shall when required, conform to the established grades of the streets as now or hereafter to be established, when such streets are brought to grade, and further,
149 said railway company shall be subject to all reasonable regulations in the construction and use of said railway which may be imposed by ordinance,"—held, assuming that such provisions became a part of the charter of the corporation, having the elements of a contract with respect thereto, that an exemption for assessment for the improvement of the street was not created, and the Legislature was not thereby prohibited from imposing a liability on such corporation to pave part of the street occupied by its tracks in conformity with the improvement of the remainder of the street. Held further, that a charter or grant of franchise rights to a corporation is to be construed strictly, and a claim of exemption cannot be sustained which is not in express terms granted or clearly implied from the terms of the grant.

In Storrie *v.* Houston St. Ry. Co., it was held, that an enlargement of the liability of a street railway company for paving a street is *not unconstitutional where* the company's rights were acquired subject to the constitutional provision that all privileges and franchises shall be subject to legislative control.

In N. Y. L. E. & W. R. R. Co. *v.* City of Dunkirk, it was held merely that the Legislature had absolute authority over the subject of taxation, and that as the railroad corporation was a creature of the statute, the Legislature might impose upon it burdens additional to those prescribed by its charter.

These cases in effect merely uphold the power of the Legislature to declare that the property of a street surface railway company is of a character to be substantially and directly benefited by the improvement of a street, and that in proportion as it is benefited may be assessed in common with other property upon the street.

In Covington *v.* Kentucky (173 U. S., 231), cited in sup-
150 port of the plaintiff's contention, it was held that the provision in the act of the Legislature of Kentucky of May 1, 1886, that certain reservoirs, etc., with the land on which they were situated, which the City of Covington was, by that act authorized to acquire and construct, should be and remain forever exempt from state, county and city tax, did not, in view of the provision of the prior act of February 14, 1856, that, "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent shall be therein plainly expressed," tie the hands of the Commonwealth of Kentucky, so that it could not, by legislation, withdraw such exemption and subject the property to taxation. The pith of the decision, so far as it is applicable here, is found in a single paragraph of the opinion of the Court, in which

it is said, "if that act (the act exempting the property from taxation) in any sense constituted a contract between the city and the Commonwealth, the reservation in the existing general statute of the right to amend or repeal it was itself a part of the contract."

It will be observed that here, in the statute of 1869, legalizing the amended ordinance of the Common Council, it is expressly provided without any reservation of a right to amend or repeal, that whenever any of the streets of the city should by ordinance or otherwise be permanently improved, the railroad company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof. The legislative provision is in terms the same as that of the amended ordinance which was the basis of the contract with the Rochester City & Brighton Railroad Company, all of the provisions of which were expressly ratified and confirmed upon further consideration moving from the defendant to the city, by the resolutions of the Common Council embodied in the contract made by the city with the defendant in 1894.

151 The provision for the exemption of the Rochester Railway Company from assessment upon its property or any part of the expense of the permanent improvement of any street or parts of streets of the city, on which the tracks of the company or its predecessors were laid prior to the general act of 1884, is as absolute as that in any of the authorities cited in the opinion of the Court of Appeals in the case of the Skaneateles Water Company against the Village of Skaneateles, in support of the inviolability of corporate charters respecting the power of taxation. (161 N. Y., 167.)

In the case of the State of New Jersey *v.* Wilson (7 Cranch, 164), it was held that, "a legislative act declaring that certain lands which should be purchased for the Indians should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative act. Such Repealing Act being void, under the clause of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts."

In State Bank of Ohio *v.* Knoop (16 How. U. S., 369), the doctrine was applied to the provision of a general banking law, under which the plaintiff bank received its charter, requiring banks to make semi-annual dividends and set off six per cent. of such dividends for the use of the State, which sum or amount so set off should be in lieu of all taxes to which the company or the stockholders therein would otherwise be subject. This, it was held, was a legislative contract fixing the amount of taxation which could not be changed without the consent of the bank. In the course of the opinion it was said that "every valuable privilege given by the charter and which conduced to an acceptance of it, is a contract which cannot be changed by the Legislature, where the power to do so is not reserved in the charter."

152 The State having adopted a new constitution, in the case of Dodge *v.* Woolsey (18 How. U. S., 331), it was held as follows: "The fact that the state consti-ution has been changed since

the passage of the act chartering the Bank, cannot release the State from the contract contained in the charter."

In McGee *v.* Mathis (4 Wall. 143), it was held that, "where a state, in order to promote the sale and reclamation of its swamp lands, provides by legislation that such lands shall be exempt from taxation for the term of ten years, and issues transferable scrip receivable therefor, the contract arising between the state and a receiver of the scrip is impaired by a subsequent act of the Legislature repealing the exemption, although the land is not taken up and the scrip paid until after the passage of such act."

In the case of Binninger *v.* City of New York (177 N. Y., 199), towhich attention is called,the question here under consideration was not before the court or under discussion. The resolution of the Common Council of the City of Brooklyn passed in the year 1853, authorizing the Brooklyn City Railroad Company to construct and operate a street surface railroad, was without legislative sanction. It was before the general railroad law empowering cities and villages to grant franchises to street surface railroad companies to construct and operate street railways, and therefore the resolution granting the franchise was beyond the power of the Common Council and void. (Potter *v.* Collis, 156 N. Y., 16.)

In the case of the Village of Mechanicsville *v.* S. & M. Street R. Co. (35 Misc., 513, affirmed without opinion, 174 N. Y., 507), it was held that the franchise or contract given to the street railway corporation, as construed by the Court, permitted a pavement of the kind adopted by the village. Having held it to be fairly presumed that neither of the parties expected or intended that the kind of pavement mentioned and originally provided for
153 in their contract, in the changed circumstances which had arisen should be laid, it was unnecessary for the Court to go further in giving reasons for its decision.

In the Binninger case and in the Mechanicsville case, Milhau *v.* Sharp (27 N. Y., 611), in which it was held that the powers of a municipal corporation in respect to the control and regulation of the streets, are held in trust for the public benefit, and without legislative sanction cannot be abrogated or delegated to private parties, was cited and applied.

Here the authority to grant the franchise given to the railway company has not only legislative sanction by special enactment, but the terms of the grant are by contract in writing, made and executed by the parties, expressly stipulated, and afterward upon a new and valuable consideration ratified and confirmed by resolution of the Common Council, formally affirmed by the terms of the contract entered into in accordance therewith.

The case here seems to furnish the strongest possible grounds for the application of the constitutional provision prohibiting the Legislature from passing laws impairing the obligation of contracts, and therefore it must be held that the Rochester Railway Company cannot be made liable by assessment or otherwise for paving between the tracks, the rails of the tracks and two feet outside, in the streets of the city in which the Rochester City & Brighton Railroad Company

had obtained its franchise and constructed its road prior to the 6th of May, 1884.

The complaint should be dismissed.

154 Supreme Court, Appellate Division, Fourth Department.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

It is hereby stipulated that the foregoing are true copies of the summons, complaint, answer, case and exceptions, findings, exceptions thereto, and notice of appeal in the above entitled action now on file in the Monroe County Clerk's Office, and of the whole thereof.

W. W. WEBB,
Corporation Counsel, Attorney for Appellant.
SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Respondent.

155 At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, commencing on the 15th day of November, 1904.

Present: Honorable Peter B. McLennan, Presiding Justice; Honorable Alfred Spring, Honorable Pardon C. Williams, Honorable Frank H. Hiscock, Honorable Martin L. Stover, Associate Justices.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

Order of Affirmance on Appeal From Judgment and Order.

The above named The City of Rochester, the plaintiff in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court, and entered in the office of the Clerk of the County of Monroe on the 18th day of April, 1904, and from an order made by said Court, denying a motion for a new trial, and entered same day, and the said appeal having been argued by Mr. W. W. Webb, of Counsel for the Appellant, and Mr. Charles J. Bissell, of Counsel for the respondent, and due deliberation having been had thereon,

156 It is hereby ordered and adjudged that the judgment and order so appealed from be and the same are hereby affirmed; and the respondent recover of the appellant the costs of this appeal, on opinion of Nash, J., delivered at Special Term. All concur.

NEWELL C. FULTON, *Clerk.*

Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

The above entitled action having been tried at a Trial Term of the Supreme Court, held at the Court House in the City of Rochester, in and for the County of Monroe, for the month of December, 1903, and the Court having duly made and filed its decision, and judgment thereupon having been entered in the office of the Clerk of the County of Monroe on the 18th day of April, 1904, dismissing the complaint upon the merits and for one thousand ninety-seven dollars and five cents ($1,097.05) costs in favor of the defendant and against the plaintiff.

And the plaintiff having duly appealed from such judgment to the Appellate Division of the Supreme Court in the Fourth Judicial Department, and such appeal having come on to be heard and having been duly argued, and the Court having duly made a decision and order unanimously affirming the judgment, so appealed from, in all things, and directing a judgment of affirmance, and a certified copy of such order, together with the remittitur from the
157 Appellate Division, having been duly filed in the office of the Clerk of the County of Monroe,

Now, on motion of Satterlee, Bissell, Taylor & French, attorneys for the defendant,

Ordered and Adjudged and this Court hereby does order and adjudge that the judgment so as aforesaid appealed from by the plaintiff be, and the same hereby is, in all things unanimously affirmed.

And it is further Ordered and Adjudged, that the defendant recover from the plaintiff the sum of one hundred sixty-two dollars and sixty-two cents, for its costs and disbursements upon such appeal, as taxed by the clerk.

JAMES L. HOTCHKISS, *Clerk.*

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

GENTLEMEN: Please take notice that The City of Rochester, the plaintiff in the above entitled action, hereby appeals to the Court of Appeals from the judgment of the Supreme Court entered herein in the Clerk's office of the County of Monroe on the 6th day of December, 1904, pursuant to an order of the Appellate Division, Fourth Department, affirming with $162.62 costs a judgment previously entered herein in the Clerk's office of the County of Monroe on the 15th day of April, 1904, dismissing the complaint herein upon the

merits, with $1,097.05 costs, and from the whole of said
158 judgment of affirmance.

Dated, Rochester, N. Y., December 6, 1904.

Yours, etc.,
W. W. WEBB,
Corporation Counsel, Attorney for Plaintiff,
46 *City Hall, Rochester, N. Y.*

To Satterlee, Bissell, Taylor & French, Attorneys for Defendant, and to the Clerk of the County of Monroe.

STATE OF NEW YORK:

In Court of Appeals.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

It is hereby stipulated that the foregoing are true copies of the summons, complaint, answer, case and exceptions, findings, exceptions thereto, judgment, notice of appeal to Appellate Division, order of Appellate Division, Judgment of Affirmance, and notice of appeal to the Court of Appeals in the above entitled action, now on file in the Monroe County Clerk's office, and of the whole thereof.

W. W. WEBB,
Corporation Counsel, Attorney for Appellant.
SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Respondent.

(Endorsed:) Filed November 6th, 1905.

159 STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of opinions in the action entitled: "The City of Rochester, Appellant, *vs.* Rochester Railway Company, Respondent," with the originals on file in the office of the State Reporter and that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the City of Albany, this twenty-third day of October, A. D., 1905

[Seal of the Court of Appeals of the State of New York.]

W. H. SHANKLAND, *Clerk.*

160 *Opinion of the Court, per Cullen, Ch. J.*

CULLEN, *Ch. J.*:

I concur in the view of Judge Gray that this defendant cannot in any way be foreclosed by our decision in the action of Conway *v.* City of Rochester (157 N. Y. 33) (an action to which it was not a party), from asserting that the immunity from contributions to the expense of new pavements in the city of Rochester, enacted by chapter 34 of the Laws of 1869, was a contract right of which it could not be deprived by subsequent legislation. On the merits, however, I am of opinion, first, that the statute mentioned did not constitute a contract between the state and the railroad company; second, that if it did, the exemption granted by the statute was personal to the defendant's predecessor in title and has not passed to it.

I assume that the provision of the General Railroad Law (section 98) requiring street surface railroad companies to pay the cost of paving between their tracks and for two feet outside thereof is an exercise of the taxing power (Sioux City St. Ry. Co. *v.* Sioux City, 138 U. S. 98; Wooster *v.* Wooster St. Ry. Co., 196 U. S. 539), though if an exercise of the police power the result would be the same. The statute of 1869 (sec. 5) enacted that the defendant's predecessor should put, keep and maintain the surface of the street inside the rails of its tracks in thorough repair, but whenever any of said streets was by ordinance permanently improved said company should not be
161 required to bear any part or portion of such improvement or of the expense thereof, but should make its rails conform to the grade of the street. This certainly did exempt the company from any expense of repavement so long as the statute remained in force, but the question is, did the statute confer upon the company any contract right immune from subsequent recall or was it the mere exercise by the legislature of the taxing power, which could at any time be changed, modified or repealed? To determine this question it is necessary to consider the condition of the parties when the statute was enacted and in that consideration to keep constantly in view the well-settled rule for the construction of statutory exemptions from taxation as declared by the Supreme Court of the United States in a long and unbroken line of decisions. In Yazoo, etc., Ry. Co. *v.* Adams (180 U. S. 1) it is said: "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become

inoperative by changes in the original constitution of the companies." (See cases there cited, particularly New Orleans City R. R. Co. *v.* New Orleans, 143 U. S. 192, and Memphis Gas Light Co. *v.* Shelby Co., 109 U. S. 398.)

In 1862 the Rochester City & Brighton Railroad Company was incorporated under the General Railroad Act of 1850 (Ch. 140) for the purpose of operating a street railroad on certain streets
162 in the city of Rochester extending into an adjoining town. That statute authorized the incorporation under it of street surface railroad companies. (Matter of Washington St. A. & P. R. R. Co., 115 N. Y. 442.) This proposition was never questioned till the decision of this court in Matter of New York Cable Company *v.* Mayor, etc., of N. Y. (104 N. Y. 1), and, in fact, most of such companies outside of the old city of New York were organized under that statute. Whatever doubts were cast on the application of the General Railroad Act to street railroads by the opinion in the Cable Company case were removed by the decision in the Washington Street case, where the remarks in the earlier case were expressly retracted. By the General Railroad Act plenary power was given to any railroad company incorporated under it to lay out and construct its road between the termini mentioned in the articles of association, except that subdivision 5 of section 28 provided that the statute should not be construed to authorize the construction of any railroad upon, along or across any streets in any city without the assent of the corporation of the city. It was, therefore, necessary for the construction of any street railroad within a city that the company should obtain the consent of the city to the use of the street. The city of Rochester by an ordinance consented to the construction of the proposed railroad. It exacted by that ordinance compliance with the terms and conditions which appear in Judge Gray's opinion. The road was built, the company failed and its road and franchise were sold in 1868 under a foreclosure, the purchaser at which conveyed to a new company, bearing the same name, also organized under the general statute of 1850. In 1869 the new company represented to the common council that the terms of the ordinance under which the road was built and being operated were too onerous and asked for relief. Thereupon the common council passed a new ordinance, the most material points of which were that the fare for children was fixed at three cents, and the company was relieved for the term of five years from its obligation to contribute to
163 the expense of the repavement or improvements of the streets, though it was required to keep the space between its tracks and one foot additional on each side in good repair. Both parties sought the action of the legislature and the statute of 1869 was passed. Now, let us see what were the rights of the parties at the time of the enactment of this statute. The company had, by the construction of the railroad by its predecessor, under the consent of the common council, and its own purchase on the foreclosure, acquired a valid franchise to operate its railroad. It is not necessary to determine what was the effect of the conditions attached by the city of Rochester to its consent. If there was no authority to impose those

conditions, nevertheless the consent was effective and the franchise valid. (Matter of Kings Co. El. R.R.Co., 105 N. Y. 97.) On the other hand, it is equally clear that under the power given by the General Railroad Act to the municipality to consent to the construction of such a road, the municipality could in no degree contract away or limit the taxing power or the police power possessed by the legislature. (People *ex rel.* Met. St. Ry. Co. *v.* Tax Comrs., 174 N. Y. 417; Sioux City St. Ry. Co. *v.* Sioux City, *supra.* See also, Wooster St. Ry. Co. *v.* Wooster, *supra.*) The rights and immunities, therefore, of the company at that time must be determined by the provisions of the act of 1850, which gave no exemption from the future exercise by the legislature of either power. In the exercise of the police power the legislature could prescribe the maximum fares to be charged by the company (Buffalo E. S. R. R. Co. *v.* B. S. R. R. Co., 111 N. Y. 132; Railroad Commission Cases, 116 U. S. 307; Norfolk & Western R. R. Co. *v.* Pendelton, 156 U. S. 667), and such right was reserved by section 23 of the statute subject to the qualification that the fare should not be reduced so that the net returns to the company should be less than ten per cent. on the sum actually invested. So equally in the exercise of the taxing power it could relieve the company from the burden of any provisions imposed on it by the ordinance of the common council in 1862. Wooster Ry. Co. *v.*
164 Wooster, *supra.*) Neither of these powers was necessarily to be exercised once for all. Unless contracted away the right to their exercise was continuous and statutes passed under them could be varied or altered from time to time. The statute does not assume to ratify or authorize any contract between the railroad company and the common council of the city. It does not recite that application has been made to the legislature by either party for its adoption. It merely enacts what the legislature was empowered to enact, whether with or without the consent of either or of both parties. Indeed, it would seem a conclusive objection to considering the statute as ratifying any contract of the common council that the ordinance of the common council gave the railroad company immunity from contribution to the expense of improvement of the street only for five years, a term long since expired, while that enacted in the statute is not limited in duration. The statute *did not* grant the franchise; that had been already acquired. Nor does the record disclose even a suggestion that there was entertained any question as to its validity. It is settled by authority that an exemption from taxation or regulation of charges granted by statute to be irrevocable must be based on a consideration; when a mere gratuity or privilege it may be recalled at any time. (Christ Church Hospital *v.* County of Philadelphia, 24 How. [U. S.] 301; Tucker *v.* Ferguson, 22 Wall. 527.) When such exemptions are granted in the charter of a corporation then the acceptance of the charter is assumed to be the consideration for the grant of the exemption. (Home of Friendless *v.* Rouse, 8 Wall. 430.) But the act of 1869 neither amends nor assumes to amend the charter of the company, and if it did it would be subject to the constitutional reservation of amendment or repeal. The true test of whether there was any consideration for the ex-

emption granted by the statute is whether any acceptance of its terms and provisions was necessary to make it effectual. If not, how can it be said that the exemption is other than a privilege? Here lies the distinction between this case and that of New Jersey *v.* Yard
165 (95 U. S. 104). In the case cited the statute of New Jersey required the written acceptance of its terms by the company or else it became wholly inoperative. It is to be further noticed that there was no provision in the New Jersey Constitution similar to that in ours, which reserved the unqualified right to alter or repeal charters, and the decision proceeded in part on this last ground. It is also settled that neither corporations nor individuals have a vested right that the law shall continue to be unchanged. Had, in 1869, instead of the special statute, a general law been passed exempting railroad companies from contribution towards the cost of repaving the streets, it is clear that such law might have been thereafter repealed, and there might be imposed on the company a reasonable and proper tax for the improvement. (Pennsylvania R. R. Co. *v.* Miller, 132 U. S. 75.) Now, how does it differ that instead of a general statute a special law was enacted? In my opinion it only goes to the intent of the legislature. If I am right in the position that the legislature could have enacted the statute of 1869, so far as its provisions are under examination here, without any assent from the railroad company, then had the act concluded, "this statute is passed in the exercise of the powers of taxation and police and not as a grant," it could not well be contended that the railroad company acquired thereby any contract or property right. I imagine that a continuous power vested in the legislature may be exercised and its exercise recalled or modified as well by special legislation as by general legislation if no provision of the State Constitution forbids, which was the case in 1869. If to-day a statute were passed repealing section 98 of the present General Railroad Law and enacting that street railroad companies shall not be compelled to pay any portion of the expense of paving the streets within their tracks, will it be denied that subsequently the legislature might change that policy and impose on the companies a burden of which it had previously relieved them? If this be so, why equally may not the legislature relieve to-day a particular railroad company from that burden and next year reimpose the burden upon it? The
166 only difference that I can see between the two cases is that in the case of a statute applicable to a particular corporation, when that statute gives the charter an intent to grant away, the right to tax may be implied, which would not be implied in the case of general legislation. But if the question comes to one merely of intent, then the rule already quoted, "that courts are astute to seize upon evidence tending to show that either such exemptions were not originally intended or that they have become inoperative," should be decisive of the question.

I am further of the opinion that any right to exemption from the cost of paving the streets, which may have been held by the Rochester City & Brighton Railroad Company, was personal and did not pass to this defendant. This has been so held in a number of de-

cisions by the Supreme Court of the United States. (Shields *v.* Ohio, 95 U. S. 319; Railroad Co. *v.* Maine, 96 U. S. 499; Railroad Company *v.* Georgia, 98 U. S. 359; Norfolk & Western R. R. Co. *v.* Pendleton, 156 U. S. 667; Yazoo *v.* Adams, 180 U. S. 1; Morgan *v.* Louisiana, 93 U. S. 217; Wilson *v.* Gaines, 103 U. S. 417; Chesapeake & Ohio R. R. Co. *v.* Miller, 114 U. S. 176; Tucker *v.* Ferguson, 22 Wall. 527.) In the Norfolk & Western Railroad case it was said: "We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchise of the first grantee; * * * this we have stated to be a salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris.*" That privilege is not at all similar to such franchises as the right to construct and operate a railroad, to lay gas mains and supply gas, and to maintain a ferry. Those franchises when granted become
167 property similar in their general attributes to other property. The grant of such a franchise, even without consideration, is, unless a right to revoke is reserved, as effectual to vest an indefeasible title in the grantee as a voluntary conveyance of a piece of land. Not so, however, as to an exemption from taxation or from the exercise of the police power. It is property only when granted on a consideration and if granted without consideration may be recalled. (See cases cited *supra.*) Doubtless such exemptions if attached to property itself would increase its value, but because they are against common right they will be construed to be personal and limited to the grantee unless a contrary intention clearly appears. The language of the statute before us is personal, not attached to the property. It enacts that "said company," not "said company, its successors or assigns," shall not be required to bear any part of the expense of repaving the streets.

The other questions presented on this appeal are disposed of by our decision in the Conway Case (*supra*) and therefore, do not require examination.

I vote for reversal of the judgments below and for the granting of a new trial, costs to abide event.

GRAY, *J.* (dissenting):

I am of the opinion that the transactions in 1869 between the defendant, the city and the state resulted in a valid contract, of which chapter 34 of the Laws of 1869 was the complete expression and final sanction, and that it was beyond the power of the legislature to impair its obligations by subsequent legislation. Neither the provisions of the General Railroad Act of 1884, nor those of the Railroad Law of 1890, could avail to recall, or to modify, the grant of the right of exemption from the burdens of future assessments for im-

proving the streets of the city of Rochester. As a vested right under the contract, it was within the protection of the State and Federal Constitutions. For 28 years the city observed this contract and, upon two occasions, by ordinances, recognized the right it had conferred. It forbore to request, or to require of, the Rochester
168 City & Brighton Railroad Company, or the defendant, that either should bear any portion of the expenses of street improvements in streets, where tracks have been laid prior to 1884, and, doubtless, would have continued to maintain that attitude of respect for its agreement, had not our decision in the case of Conway *v.* City of Rochester, (157 N. Y. 33), been regarded as warranting a different view of the relations established by the resolution and legislation of 1869. I think, too, that a precise consideration of the General Railroad Act of 1884, under which the defendant was incorporated and upon whose provisions the plaintiff's claim is, mainly, rested, aids in the conclusion that it was not necessarily applicable, in the respect we are considering, to a street railroad company, whose street franchises and construction antedated 1884.

The decision in the Conway case, in 1898, could not affect what rights were possessed by the defendant based upon the legislation of 1869; for it was not a party to, nor represented in, that action. In that case, the plaintiff, an abutting owner upon a street in which the Rochester Railway Company was operating its road, sought to prevent the city of Rochester from awarding any contract for the pavement of the street, until it had required the company to do the paving within, and two feet outside of, its tracks, under the provisions of section 98 of the Railroad Law. The questions certified to this court in that case were whether the plaintiff and the other abutting owners were assessable for the cost of that portion of the new pavement; or whether the municipal authorities were not obliged to require the railway company to do that much of the proposed work. It is true that the act of 1869 was relied upon, in the argument for the city, as exempting the company; but it was not discussed in the opinion. What we considered and determined was the nature of the statutory direction to the local authorities, with respect to a street railway company, when they exercised their power to repave a street, within which it was in operation. We held it to be mandatory upon them to require the company to do the particular portion of the work specified in the statute and the argu-
169 ment based upon the case of Gilmore *v.* City of Utica, (121 N. Y. 561), was answered by pointing out that there the statute was permissive and left it discretionary with the municipal authorities to require the street railway company to bear a portion of the expense of the repaving. The contractual status of the defendant and the city, if at all in mind, was not shown, as it has been here; otherwise than as the act of 1869 might be deemed to disclose it. What the defendant might claim and establish for itself was not before us. There was no complaint of an unconstitutional invasion of any contract right in the application of the General Railroad Acts and when the objection of the unconstitutionality of a law is not

raised by a party, who has the right to make it, the court will not raise it. (People *v.* B., F. & C. I. Ry. Co., 89 N. Y. 75, 92.) That the defendant might invoke the constitutional guarantees, when it was sought to deprive it of the enjoyment of a right secured by contract, or that it might waive them, was not a matter of assumption for the court.

That there existed the essentials to a valid contract, I regard as clear upon the facts. There was nothing to take it out of the application of those legal principles, which govern transactions between persons. The grant of a right to execute the corporate purpose was made upon the agreement of the grantee to comply with certain conditions. A consideration moved each party to the transaction and there was performance. The situation is to be considered, which existed at the time when the convention between the defendant's predecessor in interest, the Rochester City & Brighton Railroad Company, and the city of Rochester was reached; as well as what was then agreed upon between them, and, eventually, sanctioned by the act of 1869. The Rochester City & Brighton Railroad Company was organized, in 1862, under the General Railroad Act of 1850, as a horse railroad company. The act of 1854 had been passed, (Chap. 140, Laws of 1854), to regulate the construction of railroads in cities; but its application, by its terms, was to such as com-
170 menced and ended within the city. The company constructed and operated a railroad between points on either side of the city of Rochester; passing to them through the streets of the city. Upon its incorporation, the common council of the city gave its consent by resolution, as required by the act of 1850, to the construction of a street surface railroad upon the routes in the city designated, with various stipulations and conditions. One of them required that the company should improve with suitable materials, as might be required by the common council, within its tracks and for two feet and four inches outside thereof, and that it should keep so much of the surface of the street in good repair. It authorized the company to collect a fare of five cents from every person; except children under five years of age, who should ride free. This resolution, being accepted and acted upon, undoubtedly, constituted a valid contract between the company and the city, so far as the consent was given to construction and operation; just as there would have been a contract had the incorporation been one under the act of 1854. (People *v.* Sturtevant, 9 N. Y. 273; Milhau *v.* Sharp, 27 *ib.* 611, 620; Potter *v.* Collis, 156 *ib.* 16.) But that the common council could do more than consent and that it could confer rights and make stipulations, in the absence of other legislative authority, was, at least, doubtful. In that situation of affairs, however the status of contract may be regarded, the company, in 1868, failed and its franchises and properties came, through a foreclosure sale, into the possession of a successor bearing the same name. Then it was that negotiations with the city to be relieved of the onerous conditions of the resolution of 1862 resulted in an amendatory ordinance; by which the company was only required to lay its tracks even with the surface of the streets and to put the surface of the

streets, inside the rails and for one foot outside thereof, in good and thorough repair, under the direction of the committee of the common council. It was provided that, thereafter, it should keep the streets in good repair inside its tracks and between the rails during the term of five years, and that it should be exempt, for that
171 period of time, from any part of the expense of a new, or permanent, street improvement. Another requirement of the original ordinance was amended, so as to reduce the fare for children between twelve and five years of age to three cents. Both parties, however, subsequently united in the submission to the legislature of a proposed law, legalizing the action of the common council, and the passage of chapter 34 of the Laws of 1869, in question, was the result. This act empowered the company to maintain and operate a railroad in all of the city streets, in which it had a track, or which the municipal authorities might permit it to enter upon. It authorized the collection of a fare of five cents from a passenger over twelve years of age, reduced the fare of a passenger between twelve and five years of age to three cents and provided that children under five might ride free. It required the company to "put, keep and maintain the surface of the streets inside the rails of its tracks, in good and thorough repair, under the direction of the committee of the common council," and exempted it from making, or bearing any part of the expense of, permanent street improvement, beyond conforming its rails to the grade. This act was an express grant of a franchise and it removed what doubt may have existed as to the company's legal status; or as to its rights and powers under the General Railroad Act of 1850, or under the resolution of the common council. It was a grant upon conditions; which was accepted and acted upon by the extension of the company's railroad into other streets, with the expenditure of large sums of money. It was more than a mere validation of the municipal ordinance; which was merged in the comprehensive and higher legislative enactment. There was a compact with the state, to which the city had assented; whereby franchises and powers were conferred upon the corporation, as of original grant. The corporation was obliged to carry passengers between twelve and five years of age for three cents, instead of five; it was to keep the surface of the streets inside the rails of its track, in good and thorough repair, without limitation of time
172 and it was exempted from the burden of the expense of future street pavements. There was no reservation of any right to alter the conditions, or to repeal the grant of an exemption, and no such right existed under the Constitution, or in the statutes of the state; for whatever reservation of powers was contained therein related to the alteration, or repeal, of general laws, or of special acts, passed for the formation of corporations; to the alteration and repeal of charters; or to the annulment and dissolution of corporations. (Constitution, art. VIII, sec. 1; R. S. chap. 18, title 3, sec. 8; chap. 140, Laws of 1850, sec. 48.) Such reservations of power did not touch the case of a contract right, which had become property. (People *v.* O'Brien, 111 N. Y. 1, 44; Albany Northern R. R. Co. *v.* Brownell, 24 *ib.* 345.) This contract, therefore, was not subject to

recall, or to modification. The covenant was implied on the part of the government not to invade the rights vested and on the part of the grantee to execute the duties and conditions prescribed in the grant. The government could not do any act to impair the grant without breach of the contract. (3 Kent, 458; Dartmouth College Case, 4 Wheat. 519; People *v.* Sturtevant, 9 N. Y. 273.) The city and the railroad company regarded this legislation as constituting a contract, inviolable in its provisions, and gave practical construction to it from 1869 to 1897. The company extended its operations and it and the defendant, as its successor in interest, have performed what was required of them; while the city never questioned the company's right of exemption from the burden of the expense of permanent street improvements, until compelled thereto by the action of abutting property owners. Nor was the provision of the act of 1869 in the nature of a gratuitous exemption from taxation, as it is argued. The company was not relieved from taxation; it was relieved of an obligation, with which its grant from the city had been burdened, in consideration of its agreement, during its corporate existence, to do the things required of it by the act. It was not "a mere continuing gratuity, which the Legislature was at liberty to terminate and withdraw at any time;" as the legislative en-
173 actment was termed in Stanislaus Co. *v.* San Joaquin, etc., Co., (192 U. S. 201). If it were merely that, there would be lacking the contractual essential of consideration. In return for the grant of the franchise by the state, the defendant agreed to charge a lesser rate of fare than before authorized for its passengers under the age of twelve, and to *permanently* keep the street surface in good repair. The public was the gainer by the provisions of the act, in those respects, as in the encouragement given to the extension by the company of its railroad tracks throughout the city. In view of the protest and negotiations of the reorganized company for a less onerous franchise; the resolution of the common council assenting to a modification, upon conditions to be accepted by the company; the legislative enactment, ratifying the action of the city and conferring, directly, a franchise and an exemption from the previous burden attaching to its right to operate its road, and the action of the company in accepting the new rights and powers and in expending large sums of money in reliance thereupon, the argument that there was no contract, founded upon a consideration and beyond the power of the legislature to affect, or to recall, seems quite untenable. The doctrine of the cases of Binninger *v.* City of New York, (177 N. Y. 199), and of Village of Mechanic-ville *v.* S. & M. Street Ry Co., (174 *ib.* 507), has no application. In those cases, the question was one of the power of the municipalities, from which the railroad companies had received grants of rights upon conditions as to the kind of pavement to be laid within and outside of their tracks, to require the laying of a different pavement. In the Binninger case, the grant, or contract, relied upon was questionable, because without the sanction of the legislature, (having been made in 1853), and the decision went upon the ground that it was charter

legislation. In the second case, the decision below, which was affirmed here without opinion, held, substantially, that the condition of the franchise was of a nature that required the pavement to be such "as made a good condition," or of the kind adopted by
174 the village. In neither case was there the legislative sanction of the contract, under which the railroad company derived rights; nor was the question now before us raised.

There being, therefore, a valid contract with the city, which was confirmed by the state in a legislative enactment, of itself conferring upon the company its franchises and rights and an exemption from the burden of the expense of future permanent street improvements, upon the consideration of acts to be performed by the railroad company, this defendant, in February, 1890, succeeded, by lease, to its properties, rights, privileges and franchises "without change, or diminution, as they were before held and enjoyed," by virtue of the provisions of the statute authorizing the leasing. (Chap. 503, Laws of 1879, sec. 1.) The defendant, thereupon, proceeded to reconstruct its entire railroad for operation by electric power, or the "trolley system," instead of by horse-power; permission for which had been granted by the municipal authorities to the defendant's lessor and by the state railroad commissioners to the defendant, and there were expended four millions of dollars in the work. It was expressly found, upon the evidence, that this expenditure was made in reliance upon the provisions of the act of 1869 and upon the agreement with the city, relating to the right to change the motive power. The agreement referred to had been made just prior to the lease and provided, *inter alia*, for the company's compliance with ordinances relating to "the *general repairs* of the streets within and for two feet outside and adjoining the company's tracks." But repairs, it is to be observed, only, had been required by the act of 1869.

The contractual rights vested in the Rochester City & Brighton Railroad Company through the act of 1869 were property, of which the defendant became possessed; and it was not competent for the legislature to affect, or to impair, them. The contract existed, which the legislature had validated and re-enacted, and it was within the protection of the Federal and State Constitutions. There was neither an express, nor an implied, right reserved to the state
175 to alter, or to repeal, it. The obligation upon the city to observe the provision for exemption as to future expenses of street improvements was as permanent and unalterable, as was the obligation upon the company, during its corporate life, to carry passengers between certain ages for a reduced fare and to keep the street surface within its tracks in thorough repair. The discussion by the United States Supreme Court, in the cases of New Jersey *v.* Yard, (95 U. S. 104), and of Stearns *v.* Minnesota, (179 *ib.* 223), is much in point upon the power of the legislature of a state to alter, or to repeal, contracts created by legislative enactments and granting exemptions in consideration of the performance of some obligation imposed upon the grantee.

The General Railroad Act of 1884, under which the defendant was

incorporated, should not be construed as applying to existing railroad systems, whose tracks were constructed prior to 1884, and its plain provisions do not require such a construction. Although organized under the act of 1884, the defendant took over the franchises and rights of its lessor, as they were previously enjoyed, and operated the railroad property by right thereof and not under its act of incorporation. In so far as its lessor had constructed extensions of its tracks, under consents obtained from the municipal authorities, *after* the passage of the general act of 1884, to that extent, the provisions of that act would control in their operation. But, as to previously constructed tracks, their operation would be within the provisions of the legislative contract of 1869. It may be observed that the requirement of section 9 of the act of 1884, as to a corporation construing, extending, or operating, a railroad constructed, or extended, under the provisions of the act, is to "have and keep in *permanent* repair the portion of every street" etc.; which would be, indeed, but the obligation resting upon the defendant, as lessee, and would impose no greater burden, apparently. But section 18 of the act expressly provides that nothing therein "shall interfere with, or repeal, or invalidate, any rights heretofore acquired under the laws of this state by any horse railroad company, or affect, or repeal, any right of any existing street surface railroad company to * * * operate * * * its road in accordance with the terms and provisions of its charter" etc. The consents, under which the extensions were granted to the defendant's lessor, were upon the condition, as required by the act to be expressed, in such a case, "that the provisions of chapter 252 of the laws of 1884 *pertinent thereto* shall be complied with," and those granted to the defendant since the lease were upon the condition "that the provisions of Article IV of the Railroad Law *pertinent thereto* shall be complied with." That new extensions of tracks and the operation of the railroad franchise therewith should bring the corporation within the government of the provisions of the General Railroad Acts is not unreasonable and I do not understand the defendant to raise any question as to that.

176

As to the Railroad Law of 1890, and its amendments, we must assume, in view of our decision in the *Conway Case*, (*supra*), that section 90, in making its provisions applicable "to every corporation, which under the provisions thereof, or of any other law, has constructed, or shall construct or operate, etc., a street surface railroad" etc., is unconstitutional and void as to the defendant. The argument is that the defendant has waived, or "contracted away," any claim to exemption, in extending its railroad into various streets under consents, which are so conditioned as to require compliance with the provisions of article 4 of the Railroad Law, and in the proceedings for the confirmation of the location of its tracks. With respect to the defendant's extensions of its railroad under the Railroad Law of 1890, I am of the opinion that it is entitled to insist upon the limitation that only such of the provisions of article IV apply as, in the language of the statute, are "pertinent thereto" and that the provision as to street repairs, if more is required of the company than

it is already obliged to do, is not pertinent as to tracks laid under franchises, prior to 1884; because of the exemption contained in the act of 1869. Furthermore, I think that the defendant's undertaking, in obtaining, and in carrying out, the extensions of its road, should be regarded as having relation only to so much of the rail-
177 road system, as was constructed and put into operation after the passage of the General Act of 1884, and not as an agreement to waive what benefit, or privilege, had been secured through the act of 1869 to its lessor. There were no words of waiver and there is nothing to justify an implication of such. What the defendant applied for was the franchise to extend an existing road into other streets and the consents had reference to such extensions, and the terms upon which they were given brought the operation of such new tracks within the requirements of the General Railroad Law.

As to the proceedings for the confirmation by the municipal authorities of the location of the tracks of the companies, under whose franchises the defendant was operating, I am unable to find any agreement to waive the protection of the Constitution as to any right secured by the act of 1869. The defendant's petition set forth the lack of formality in fixing the location of the tracks in the streets, notwithstanding that the rights had been granted and that the consents of the property owners had been obtained, and a formal resolution of ratification and approval was prayed for. The common council passed an ordinance directing a contract to be prepared, containing the terms upon which the prayer of the petition would be granted, which was to be executed by both parties. The contract, as drawn and executed, ratified the location of the railroad as then operated and stated the conditions to be observed. They were, in brief, that the provisions of article IV of the Railroad Law should be complied with; that the company should furnish transportation to two policemen at a time upon each car and should issue tickets to detectives, and that it should furnish like transportation to two firemen on each car. It was then, finally, provided by a clause of the contract that "all the provisions of any agreement between the city of Rochester and any street railroad company and all ordinances, resolutions, grants and consents heretofore passed by said city, with reference to the construction, maintenance, or operation of street railroads within said city, shall remain in full and binding
178 force and these resolutions shall not be construed as * * * repealing, modifying, or changing in any respect, the terms or provisions of any agreement previously entered into between said city and any street railroad company." There appear to be two sufficient answers to the claim of the plaintiff that by this agreement the defendant had "contracted away" the right to exemption conferred by the act of 1869. The provision for compliance with article IV of the Railroad Law was but the formal insertion of a condition, which the Railroad Law required to be inserted in grants, consents, or franchises, and it is qualified, as a general provision, by the final and saving clause of the contract. This was but a simple contract between the parties, which had for its purpose the settlement of any question about the actual location of the tracks in the streets. The city was

asked for no franchise, nor did it grant any. The franchises existed and were being lawfully operated by the defendant. The contract, while desired by the defendant to prevent any question as to the proper location of its tracks, obtained for the city the right to have members of its police and fire departments carried free. But the final clause clearly operated to preserve whatever contractual rights the defendant had become possessed of under the lease, and it expressly provided that the resolution should not be considered as repealing, or changing, any agreement previously entered into. There would appear to be little if any reason for the insertion of this saving clause, unless to qualify the broad application of the provisions of article IV of the Railroad Law.

Without further discussion of the questions, I think enough has been said to show that the defendant is entitled to insist upon the right to be exempted from the burden of the expense of any new, or permanent, improvements in streets, wherein tracks were constructed and operated under franchises prior to 1884. I, therefore, advise the affirmance of the judgment.

Haight, Vann and Werner, JJ., concur with Cullen, Ch. J.; O'Brien and Bartlett, JJ., concur with Gray, J.

Judgment reversed, etc.

A true copy.

E. A. BEDELL,
State Reporter.

179 (Endorsed:) Filed November 6th, 1905, in Monroe County clerk's office.

180 At a Special Term of the Supreme Court held at the Court House in the City of Rochester, in and for the County of Monroe, on the 3rd day of November, 1905.

Present: Hon. Nathaniel Foote, Justice.

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

A judgment having heretofore and on the 18th day of April, 1904, been entered in the above entitled action in the Monroe County Clerk's Office dismissing the complaint herein upon the merits, with $1,097.50 costs, in favor of the above named defendant and against the above named plaintiff; and the plaintiff having appealed therefrom to the Appellate Division of the Supreme Court, Fourth Department, and said judgment having been affirmed, and a judgment having been entered in this action in the Monroe County Clerk's Office on the 6th day of December, 1904, affirming said judgment appealed from, with $162.62 costs in favor of the above named defendant and against the above named plaintiff; and the plaintiff having thereupon appealed to the Court of Appeals, and said appeal

having been argued before that court, and said Court of Appeals having sent hither its remittitur in which it is ordered that the said judgment appealed from be reversed, and that the Supreme Court award final judgment in favor of the above named plaintiff and against the above named defendant for the amount claimed
181 in the complaint herein, together with interest and costs,—

Now, upon reading and filing the remittitur of the Court of Appeals in the above entitled action, and upon motion of William W. Webb, Corporation Counsel, attorney for plaintiff, it is

Ordered, that the order and judgment of the Court of Appeals in the above entitled action be, and the same hereby is, made the order and judgment of this Court, and judgment is directed to be entered accordingly.

JAMES L. HOTCHKISS, *Clerk.*

182 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

A judgment having heretofore and on the 18th day of April, 1904, been entered in the above entitled action in the Monroe County Clerk's Office, dismissing the complaint herein upon the merits with one thousand ninety-seven dollars and fifty cents ($1,097.50) costs in favor of the above named defendant and against the above named plaintiff; and the plaintiff having appealed therefrom to the Appellate Divison of the Supreme Court, Fourth Department, and said judgment having been affirmed and judgment having been entered in this action in the Monroe County Clerk's office on the 6th day of December, 1904, affirming said judgment appealed from, with one hundred sixty-two dollars and sixty-two cents, ($162.62) costs in favor of the above named defendant and against the above named plaintiff; and the plaintiff having thereupon appealed to the Court of Appeals, and said appeal having been argued before that court, and said court having sent hither its remitfitur in which it is ordered that the order appealed from be reversed and that the Supreme Court award final judgment in favor of the above named plaintiff and against the above named defendant for the amount claimed in the complaint herein together with interest and costs; and an order having been made herein at a special term of the Supreme Court held at the Court House in the City of Rochester, in and for the County of Monroe, on the 3rd day of November, 1905, making the judgment and order of the Court of Appeals in this action the judgment and order of the Supreme Court herein, and directing that judgment be entered in accordance with the terms hereof.

183 Now, upon motion of William W. Webb, Corporation Counsel, attorney for plaintiff, it is

Ordered and adjudged, that the judgment entered herein in the office of the Clerk of the County of Monroe on the 18th day of April, 1904, dismissing the complaint herein upon the merits with $1,-

097.50 costs in favor of the defendant and against the plaintiff, be, and the same hereby is, reversed, annulled and altogether held for nothing. And it is

Further ordered and adjudged, that the judgment entered herein in the office of the Clerk of the County of Monroe on the 6th day of December, 1904, affirming the aforesaid judgment with $162.62 costs in favor of the above named defendant and against the above named plaintiff, be, and the same hereby is, reversed, annulled and altogether held for nothing. And it is

Further ordered and adjudged, that the judgment entered herein in the office of the Clerk of the County of Monroe on the 6th day of December, 1904, affirming the aforesaid judgment with $162.62 costs in favor of the above named defendant and against the above named plaintiff, be, and the same hereby is, reversed, annulled and altogether held for nothing. And it is

Further ordered and adjudged, that the plaintiff, The City of Rochester, recover of and from the defendant, Rochester Railway Company, the sum of eighteen thousand, two hundred sixty-four dollars and two cents ($18,264.02), with four thousand two hundred ninety-two dollars and fifty-three cents,—($4,292.53) interest as computed and fixed thereon, aggregating twenty-two thousand, five hundred fifty-six dollars and fifty-five cents ($22,556.55), together with eleven hundred forty-eight dollars ($1,148) costs as taxed, amounting to the sum of twenty-three thousand, seven hundred and four dollars and fifty-five cents ($23,704.55), and
184 that it have execution therefor.

JAMES L. HOTCHKISS, *Clerk.*

(Endorsed:) Supreme Court, Monroe County.—The City of Rochester ag'st Rochester Railway Company.—Order and Judgment.—William W. Webb, Corporation Counsel,—Attorney for Pl'ff.,—46 City Hall,—Rochester, N. Y. Filed November 6th 1905 at 3.55 P. M.

185 Supreme Court of the United States.

ROCHESTER RAILWAY COMPANY, Plaintiff in Error,
vs.
CITY OF ROCHESTER, Defendant in Error.

Petition for Writ of Error.

Now comes the Rochester Railway Company, by Porter M. French, its attorney, and says that on the 18th day of October, A. D., 1905, the Court of Appeals of the State of New York made and entered a final order and judgment herein in favor of the City of Rochester, defendant in error above named, and against the Rochester Railway Company, plaintiff in error above named, and afterwards and on the 6th day of November, A. D., 1905, the records and proceedings in said cause having been remitted to the Supreme Court of the State of New York in and for Monroe County, the said final order and

judgment of the Court of Appeals were made and entered as the final order and judgment of said Supreme Court, in which final order and judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the said relator, all of which will more in detail appear from the assignment of record, which is filed with this petition.

The said Court of Appeals of the State of New York is the
186 highest court of the said State of New York in which a decision in this cause could be had.

Wherefore, your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of the State of New York, for the correction of errors and reversal of the judgment so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States; that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed and that upon the giving of such security all further proceedings in said court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated, 16th day of November, 1905.

PORTER M. FRENCH,
Attorney for Petitioner.

The writ of error, as prayed for in the foregoing petition, is hereby allowed and the bond is fixed at the sum of one thousand dollars.

Dated, 16th day of November, 1905.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

187 [Endorsed:] In the Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs.* City of Rochester, Defendant in Error. Petition for Writ of Error P. M. French Att'y for Pl'ff in Error, German Insurance Bldg., Rochester, N. Y. Filed Nov. 17, 1905 Monroe Co.

188 Supreme Court of the United States.

ROCHESTER RAILWAY COMPANY, Plaintiff in Error,
vs.
THE CITY OF ROCHESTER, Defendant in Error.

Assignment of Errors.

Now comes the Rochester Railway Company, the above named plaintiff in error, by Porter M. French, its attorney, and in connection with the petition for a writ of error filed herewith, says: that in the records and proceedings in this cause, and in the final order and judgment made and entered herein, on the 6th day of November, A. D. 1905, by the Supreme Court of the State of New York, on a

remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:

I.

The Court erred in holding that the act of the legislature of the State of New York, approved February 27, 1869, being chap. 34 of the laws of the State of New York for the year 1869, entitled
189 "An act for the relief of the Rochester City and Brighton Railroad Company," in connection with the ordinance of the City of Rochester passed June 24, 1862 as amended by the ordinance of said City passed January 12, 1869, together with the acceptance by the Railroad Company and its performance of the conditions, did not constitute an inviolable contract beyond the power of the legislature to alter, amend or impair.

II.

The Court erred in holding that even if such act, in connection with such ordinances mentioned in the first assignment herein and its acceptance and the action thereon by the Railroad Company, did constitute such contract, that portion thereof which exempted the Rochester City and Brighton Railroad Company from paying for new pavements, or any part thereof, in any streets mentioned and referred to in the complaint herein, was personal to such Railroad Company and did not pass to the plaintiff in error by virtue of the merger by the plaintiff in error of all of the estate, property, rights, privileges and franchises of such Rochester City and Brighton Railroad Company, made under and by virtue of the provisions of chap. 254 of the laws of the State of New York of 1867, as amended by chap. 503 of the laws of the State of New York of the year 1879.

190 III.

The Court erred in holding that chap. 565 of the laws of the State of New York of the year 1890, as amended by chap. 676 of the laws of the State of New York of the year 1892 and by chap. 933 of the laws of the State of New York of the year 1895, did not violate the provisions of sub-division 1 of sec. 10 of art. 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, in so far as it repealed, or assumed to repeal, so much of chap. 34 of the laws of 1869 as exempted the Rochester City and Brighton Railroad Company from paying for any part of the new pavements in the streets mentioned and referred to in the complaint herein.

IV.

The Court erred in holding that said chap. 565 of the laws of the State of New York of the year 1890, as amended as aforesaid, did not violate the provisions of sec. 1 of art. 14 of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in so far as it repealed, or assumed to repeal, so much of chap. 34 of the laws of 1869 as

exempted the Rochester City and Brighton Railroad Company from paying for any part of the aforesaid new pavements.

191 V.

The Court erred in holding that said chap. 565 of the laws of the State of New York of the year 1890, as amended as aforesaid, did not violate the provisions of sub-division 1 of sec. 10 of art 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, in so far as it imposed, or assumed to impose, upon the plaintiff in error the duty of paying for any part of the new pavements in the streets mentioned and referred to in the complaint herein.

VI.

The Court erred in holding that said chap. 565 of the laws of the State of New York of the year 1890, as amended as aforesaid, did not violate the provisions of sec. 1, of art. 14 of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in so far as it imposed, or assumed to impose, upon the plaintiff in error the duty of paying for any part of the aforesaid new pavements.

Dated the 16th day of November, 1905.

PORTER M. FRENCH,
Attorney for Petitioner.

192 [Endorsed:] Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs.* The City of Rochester, Defendant in Error. Assignment of Errors. P. M. French, Attorney for Plaintiff in Error. German Insurance Bldg., Rochester, N. Y. Filed, Nov. 17th 1905 Monroe Co.

193 Know all men by these presents, that we, Rochester Railway Company, a corporation created by and under the laws of the State of New York, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the City of Rochester in the full and just sum of one thousand dollars ($1,000), to be paid to the said City of Rochester, its successors and assigns, to which payment well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated the 14th day of November, in the year of our Lord one thousand nine hundred and five.

Whereas, lately in the Supreme Court of the State of New York, in a suit pending in said court between said City of Rochester, plaintiff-appellant, and said Rochester Railway Company, defendant-respondent, a judgment was rendered on a remittitur from the Court of Appeals of the State of New York against said Rochester Railway Company, defendant-respondent, in favor of said City of Rochester, plaintiff-appellant, and said defendant-respondent having obtained from a justice of the Supreme Court of the United States

a writ of error and filed a copy thereof in the clerk's office of said Supreme Court, to reverse said judgment in the aforesaid suit, and a citation directed to said City of Rochester, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Rochester Railway Company, a corporation as aforesaid, should prosecute the said writ of error to effect and answer all
194 damages and costs if it fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

ROCHESTER RAILWAY COMPANY,
[L. S.] By JOSEPH C. COLLINS, *Secretary.*
AMERICAN SURETY COMPANY OF NEW YORK,
[L. S.] By E. FRANK BREWSTER,
Resident Vice-President.

Attest:
FREDERICK W. SMITH,
Resident Ass't Sec'y.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 14th day of November, in the year one thousand nine hundred and five, before me personally came Joseph G. Collins, to me known, who being by me duly sworn, did depose and say, that he resided in Rochester, New York; that he is the secretary of the Rochester Railway Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

FREDERICK W. COIT,
Com'r of Deeds.

195 STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 14th day of November 1905, before me personally appeared, E. Frank Brewster, Resident Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the City of Rochester; that he is the Resident Vice-President of the American Surety Company of New York, the Corporation described in and which executed the within instrument; that he knew the corporate seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets

as ascertained in the manner provided by law. And the said E. Frank Brewster further said that he was acquainted with Frederick W. Smith, and knew him to be the Resident Assistant Secretary of said Corporation, that the signature of said Frederick W. Smith subscribed to the said instrument is in the genuine handwriting of the said Frederick W. Smith and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said E. Frank Brewster, Resident Vice-President.

JACOB J. LE JOUGH,
Com'r of Deeds.

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following Resolution was adopted:

"*Resolved,* That the President and Vice-Presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the Secretary, one of the Assistant Secretaries, or one of the attorneys."

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

I, Frederick W. Smith, Resident Assistant Secretary of the American Surety Company of New York, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original Resolution.

Given under my hand and seal of the Company at the City of Rochester, this 14" day of November 1905.

FREDERICK W. SMITH,
[L. S.] *Resident Assistant Secretary.*

I hereby approve of the foregoing bond and of the surety named therein. Dated, this 16 day of November, 1905.

R. W. PECKHAM,
Associate Justice, Supreme Court of the United States.

196 [Endorsed:] In the Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs. Rochester Railway Company,* Defendant in Error. Bond on writ of error. P. M. French, Att'y for Pl'ff in Error, German Insurance Bldg., Rochester, N. Y. Filed Nov. 17, 1905 Monroe Co.

197 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the City of Rochester, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in the City of Washington in the District of Columbia, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the Supreme Court of the State of New York for the County of Monroe, in a case wherein Rochester Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Rufus W. Peckham Associate Justice of the Supreme Court of the United States, this 16th day of November, in the year of our Lord one thousand nine hundred and five.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Copy of the above citation received by me at the office of the Clerk of the County of Monroe in the State of New York, this 17th day of November, 1905.

W. W. WEBB,
Attorney for City of Rochester.

198 [Endorsed:] In the Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs.* City of Rochester, Defendant in Error. Citation. P. M. French, Att'y for Pl'ff in Error, German Insurance Bldg., Rochester, N. Y. Filed Nov. 17, 1905, Monroe Co.

199 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of New York on a remittitur from the Court of Appeals of the State of New York, being the highest Court of law or equity of the said state in which a decision could be had, before you, or some of you, between the City of Rochester, plaintiff-appellant, and the Rochester Railway Company, defendant-respondent, wherein was drawn in question the validity of a statute of, and an authority exercised under, said state, on the ground of their being repugnant to the constitution of the United States, and the decision was in favor of such their validity, and manifest error has happened to the great damage of the said Rochester Railway Company, as by its complaint

appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, that the record and proceedings aforesaid be inspected and the said Supreme Court may cause further to be done therein to correct that error, which of right and according to the laws and customs of the United States should be done.

200 Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 16 day of November, in the year of our Lord one thousand nine hundred and five.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States,

Allowed by

R. W. PECKHAM,
Associate Justice of the United States Supreme Court.

201 [Endorsed:] In the Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs.* City of Rochester, Defendant in Error. Writ of Error. P. M. French, Att'y for Pl'ff in Error, German Insurance Bldg., Rochester, N. Y. Filed Nov. 17, 1905, Monroe Co.

202 STATE OF NEW YORK, *County of Monroe, ss:*

I, James L. Hotchkiss, clerk of said County of Monroe and also clerk of the Supreme Court of the State of New York held therein, do hereby certify that the annexed transcript of record of papers on appeal to the Court of Appeals of said state, the remittitur issued by and from said Court of Appeals, the order of the Supreme Court, pursuant to said remittitur, and the judgment, in pursuance of said order, thereon. I have compared with the originals thereof entered and filed in this office and that the same are true transcripts of said originals and of the whole thereof; that the annexed copies opinions of the Court of Appeals, together with a copy of the certificates of the clerk of the Court of Appeals and of the State Reporter thereto attached, I have compared with the copies opinions of the Court of Appeals and the certificates of the Clerk of said Court of Appeals and of the State Reporter, thereto attached, on file in this office and the same are true copies thereof, and of the whole thereof; that attached to such transcript of record are true copies of the writ of error, with allowance thereon, the petition for said writ, with allowance thereof, fixing amount of security therefor, made thereon, and citation with acceptance of service thereof, assignment of error and

bond on writ of error, which I have compared with the originals thereof on file in this office and find the same to be true copies of the same and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 24th day of November, 1905.

[Seal Monroe County, Rochester, N. Y.]

JAMES L. HOTCHKISS,
Clerk of Monroe County and of the Supreme Court of the State of New York.

Endorsed on cover: File No. 20,003. New York supreme court. Term No. 156. Rochester Railway Company, plaintiff in error, *vs.* City of Rochester. Filed December 4th, 1905. File No. 20,003.